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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF NEVADA,

DURING THE YEAR 1866.

REPORTED BY

ALFRED HELM, CLERK OF THE COURT.

VOLUME 2.

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J U S T I C E S

OF THE

S U P R E M E C O U R T .

HON. JAMES F. LEWIS	CHIEF JUSTICE.
HON. H. O. BEATTY.....	} ASSOCIATE JUSTICES.
HON. C. M. BROSNAN...	

OFFICERS OF THE COURT.

GEORGE A. NOURSE.....	ATTORNEY GENERAL.
ALFRED HELM.....	CLERK.

D I S T R I C T J U D G E S

OF THE STATE OF NEVADA.

FIRST DISTRICT.....	{	HON. R. S. MESICK, HON. RICHARD RISING, HON. CALEB BURBANK.
SECOND DISTRICT.....		HON. S. H. WRIGHT.
THIRD DISTRICT.....		HON. W. HAYDON.
FOURTH DISTRICT.....		HON. C. C. GOODWIN.
FIFTH DISTRICT.....		HON. S. L. BAKER.
SIXTH DISTRICT.....		HON. E. F. DUNN.
SEVENTH DISTRICT.....		HON. WILLIAM H. BEATTY.
EIGHTH DISTRICT.....		HON. DANIEL VIRGIN.
NINTH DISTRICT		HON. S. H. CHASE.

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ERRATA.

Page 100, 4th syllabus, for "*these*" read "*the*."

Page 157, 3d syllabus, for "*on*" read "*or*."

Page 342, 1st syllabus, for "*renewed*" read "*received*."

REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF NEVADA,
DURING THE YEAR 1866.

C. C. CHASE, APPELLANT, *vs.* THE SAVAGE SILVER
MINING COMPANY, RESPONDENT.

If one locates a mining claim for himself and others, and then enters into a contract for himself and on behalf of the co-locators to give a part of the ground for developing the mine, can the parties whose name he has used in the location accept of their interest in the mine without also ratifying the contract for developing the mine?

In such case, if the acting locator draws up a contract with prospectors, which shows on its face that it was intended to be executed, not only by the party preparing the instrument, but also by others, whose names were attached without their knowledge to the notice of location, these latter are not bound until they sign the contract. The acting locator does not, in such case, profess to act for his associates.

An agent cannot bind his principal by a written instrument, unless it appears from the instrument itself he was acting for the principal.

After notices of location were posted and recorded, and the limits of the mine determined, all the locators became tenants in common. The acting locators could not dispose of the interests of their co-tenants.

If a contract between prospectors and the several locators of a mine is drafted, and signed by part only of the locators, if the prospectors go on to work, it is at their own risk. Those not signing or consenting to the contract are not bound.

If, however, all had been consulted and agreed to the contract, and permitted the prospectors to go on with the work, probably they might have been compelled to a specific performance, although some of them had neglected to sign the contract. But the contract could not be enforced against one who never assented to it.

Chase v. The Savage Silver Mining Company.

APPEAL from a judgment of the District Court of the First Judicial District, the Hon. CALEB BURBANK, presiding.

All the facts which have any bearing on the points decided, are stated in the opinion.

Perley & DeLong, James F. Hubbard, and J. M. Nougues, appeared for Appellants.

Crittenden & Sunderland, and Hillyer & Whitman, for Respondents.

Very voluminous briefs and arguments were filed by all the counsel on each side. The discussion took so wide a range that it would be impossible to give even a condensed synopsis of the various arguments without extending this report to a most unreasonable length. We have therefore omitted giving any statement of the various points made.

After the rendition of the decision, a rehearing was granted, but before the case was finally disposed of, it was compromised, and no final opinion was ever rendered by the Court.

Opinion by LEWIS, C. J., BROSANAN, J., concurring.

This action was brought to recover an interest of sixty-six and two-thirds feet in the Savage Silver Mining ground, of which plaintiff claims he is unlawfully deprived by the defendant.

The established facts material to the issue are substantially as follows: On the fourth day of July, A.D. 1859, L. C. Savage and H. Carmack located the ledge now claimed by the defendant, for themselves and four others, among whom was the plaintiff. At the time of such location the plaintiff was residing in the State of California, and knew nothing of the location. On the ninth day of July, five days after the limits of the claim were defined, and the notice of location was recorded, a contract was drawn up in form between R. Crall, C. C. Chase, H. Carmack, W. Sturdevant, L. C. Savage, and A. O. Savage, the locators, as parties of the first part, and J. McFadden, W. W. Caperton, J. B. Endicott, Samuel Baird, Elisha McCurdy, and — Hall, as parties of the second part, by the terms of which the parties of the second part agreed to pro-

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pect the mining location above referred to "until they struck pay dirt," and in consideration thereof one-half of the entire claim was conveyed to them.

This instrument, though drawn up in form for execution by all the parties, was only signed by L. C. Savage and H. Carmack, on the one side, and W. W. Caperton and S. McFadden on the other. There is not a syllable in the contract from which it can be inferred that the parties who signed it intended to act for or as the agents of the others; but as it is presented to us, appears to be an instrument incompletely executed, being signed only by four out of twelve who are named as parties to it. The plaintiff, Chase, was not informed of his interest in the claim until a month or two after its location and the execution of the contract above referred to. In November following he came to Nevada, and then for the first time he was shown the contract.

He at once declared to Mr. Savage, who showed it to him, that his name was not signed to the contract, and that he did not consider himself bound by it. Savage replied that he did not suppose he was.

At that time several ineffectual efforts were made by Savage and Chase to find the prospectors; but the plaintiff returned to California without having seen any of them. Some work had been done on the claim by them at that time, but they do not appear to have been at work whilst the plaintiff was there in November.

The interest of each locator consisted of one hundred and thirty-three and a third feet. In December, A.D. 1859, the plaintiff conveyed away one-half of his interest, which, if he is not holden upon the contract entered into by Savage and Carmack, leaves about sixty-six feet to which he is still entitled, and to recover which this action is brought.

The prospectors, Baird and his associates, treating the contract as a conveyance *in presenti* to them of one-half of the entire ground, conveyed their respective interests to persons from whom the defendant claims title and the right of possession.

Before the bringing of this action the mine had been developed by the defendant at a vast expense, and valuable and costly improvements had been placed upon the ground, whilst the plaintiff remained quiet and gave no notice of his claim. Upon this state

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of facts it is urged on behalf of the defendant, that Savage and Carmack, in executing the contract, acted as the agents of the plaintiff Chase, and that he was therefore bound by it; that he could not accept his interest in the mine and repudiate the contract made for the purpose of developing it; and that in adopting the acts of his agents in the location, he also adopted their subsequent acts with respect to the development and working of it—for it is said a principal on whose behalf an unauthorized agent assumes to act, cannot ratify a part of the transaction without ratifying the whole.

Adopting this view of the case, the Court below, among many other instructions bearing upon the same point, charged the jury as follows: "If you find that L. C. Savage made the location for the plaintiff, and then made the contract in good faith toward the plaintiff, and that the knowledge of the location and of the contract came to him at the same time, then the adoption of the location would be the adoption of the contract."

Whether this instruction would be proper, if Savage or Carmack had assumed to act as the agent of Chase in executing the prospecting contract, as they did in locating the ground, need not be determined in this case, for there is nothing either in the contract itself or the evidence offered at the trial, from which it can be inferred that they even intended to act for him in executing it. So the argument of counsel for respondent rests upon a false premise in that respect, and the conclusion must necessarily be incorrect. If Savage had signed the contract for Chase as his agent, or if there was anything in the contract itself by which it might appear that it was intended to bind him, there might be some ground for claiming that he is holden upon it. Nothing of the kind, however, appears. It is simply a contract in form between the parties, and signed only by four of the number for themselves. There is nothing in the contract by which we can even presume that Savage or Carmack had any intention whatever of acting for the plaintiff. But if it be admitted that they did in fact so intend, that would not be sufficient without the legal steps being taken to accomplish their object. As stated by Justice Bronson, in *Townsend vs. Corning* (23 Wend. 441): "It is not enough that a man intends to do a

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legal act, unless he uses the legal means for accomplishing his object."

So in this case Savage and Carmack may have intended to act as the agents of the plaintiff in the execution of the contract, but as they have not manifested that intention in legal form, it is of no consequence. Indeed it is a well established rule that every written contract made by an agent, in order to be binding upon his principal, must purport on its face to be made by the principal, or the intent to bind him must appear in the instrument itself. (*Williams v. Christie*, 10 Howard P. Rep. 12; *Staunton v. Camp et als.*, 4 Barbour, S. C. Rep. 274; *Townsend et als. v. Corring*, 23 Wend. 435; *Evans v. Wells*, 22 Wend. 324; *Townsend v. Hubbard et al.*, 4 Hill, 351; *McDonald et al. v. Bear River Co.*, 13 Cal. 235.) In the case of *Williams v. Christie*, above cited, the contract was one for the sale of certain real property in New York, and purported to be made between Jane Christie, Stephen L. Preston and Margaret Ann, his wife, Levi H. Truex and Mary Jane, his wife, of the first part, and the plaintiff, Williams, of the second part. The wives of Preston and Truex were present when the contract was drawn up, but the instrument was only signed by Jane Christie, Preston, Truex and Williams, and the Supreme Court of New York held the contract utterly void as to those who had not signed it. In delivering the opinion, Justice Bronson says: "The signatures of the husbands of Mrs. Preston and Mrs. Truex do not purport to have been made in behalf of or as agents of their wives. There is nothing on the face of the agreement which intimates that they are agents, or that they assumed to act as agents for their wives in signing it. We consider the doctrine well settled that every written contract made by an agent, in order to be binding upon his principal, must purport on its face to be made by the principal, and must be executed in his name and not in the name of his agent." The instrument in this case was not under seal, and therefore it was not necessary that the name of the principal should be signed to it, but it is indispensable that it should appear upon its face that it was intended to be made for the principal. After the notices of location were posted and recorded, and the limits of the claim defined, the locators became tenants in common of the ground. They stood in that character at the time the contract was executed by Savage and Carmack. As such ten-

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ants in common they had a right to dispose of their own interests, but they could in no way dispose of or encumber the interests of their co-tenants.

The contract, therefore, if it be binding upon any one, can only be upon those who signed it. If we should feel disposed to disregard the rules of law, that to make a written contract by an agent binding upon his principal, it must appear upon its face to have been the intention to bind him, and that one tenant in common cannot convey or encumber the interest of his co-tenant, and be governed solely by the intention of Savage and Carmack, we could come to no different conclusions; for there is nothing in the record showing that they ever intended to act for the absent locators; but, on the contrary, it seems to have been the intention to get Chase to execute the contract for himself—for Savage says in his testimony that he did not expect he was bound by it, unless the locators got him to sign it, or he executed a deed for one-half of the ground. The instrument itself is in form the contract of all the parties, and had it been signed by all would probably have conveyed one-half the ground to the prospectors.

Until it was so signed, however, it was incomplete, and the prospectors could not have been compelled to perform their part of it until signed by all the locators. If they went on and did the work under it before it was completely executed, they did it at their own risk, and cannot now come in and claim the same rights under it which they could if signed by all the parties. Had all the locators in fact entered into a contract of this kind, and merely neglected to sign it, without intending to abandon it, and they permitted the prospectors to do the work, as if it were completely executed, there is, perhaps, no doubt but a specific performance would be decreed upon a proper application to a Court of Equity; but surely no Court would enter such a decree against one who had in no way entered into such contract, either verbally or by writing. If we are correct in the conclusion that the instrument was the contract of Savage and Carmack only, or that they did not intend to act as the agents of the plaintiff, there could be no ratification by Chase. There was nothing for him to ratify. There had been no attempt to act for him in the execution of the contract. So the proposition that the plaintiff could not adopt the location without also adopting the con-

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tract, or rather that he could not accept the benefit and repudiate the burdens, is answered by the statement of the fact that there was no attempt to make the interest of Chase subject to the contract, or to impose any burden upon it, but it was left for him to do it himself if he chose to do so. And there is no law to sanction the position that he could not adopt the acts of Savage when he acted as his agent in acquiring certain property, without also adopting other transactions with respect to that property in which he merely acted for himself. Suppose Savage and Carmack had mortgaged their respective interests in the claim, for the purpose of obtaining money to develop it, instead of entering into this contract, would it be claimed that the plaintiff could not accept his interest in the claim without assuming a certain proportion of the mortgage? Could the mortgagee in such case claim that his mortgage covered Chase's interest as well as the mortgagors? Most certainly not. And yet we can see no difference upon principle between that case and the one at bar.

If he could accept the location in the hypothetical case without assuming the burden of the mortgage, why can he not, in this case, accept his interest in the location without adopting a contract which did not purport in any way to bind him or his interest? True, by its terms one-half of the entire claim was conveyed to the prospectors, but until executed by all the parties to it, it was either no contract at all, or only the contract of those who signed it.

It was not the intention of Savage and Carmack to convey one-half of the entire claim themselves, but only of *their interest* in it. The prospectors must have known that fact. The contract itself was evidence of it, and that would appear to be the understanding of all the parties. When signed by only two of the parties, therefore, as stated before, the contract was either a nullity, or it was binding upon those only who signed it. If all those who were to sign it failed to do so, the prospectors, by going on with the work under it, could not increase the liability of those who did sign it. The contract, then, stands precisely the same as if Savage and Carmack had in terms conveyed simply one-half of their interest in the claim. With this view of the case, it is obvious that it was no part of the plaintiff's duty to give the prospectors notice that he was not holden upon the contract, for they had no reason to suppose that he was.

- Maynard v. Johnson.

We have examined this case with a sincere desire to find some authority for affirming the judgment of the Court below, for we look upon it as one of those cases where the application of the inflexible rules of law operates as a flagrant injustice, which we are loth to sanction.

We have, however, no option but to follow the clear rules of law: for to declare, not to make, the law is the province of the Courts. It is a deplorable fact, which we fully realize, that these stale claims, conjured up from the lawless irregularities of a period when legal forms were disregarded, and physical force was the only law recognized by society, have been a blight upon the prosperity of the great dominant interest of this State.

The rules of the common law, though founded in reason and sanctioned by the wisdom of centuries, afford it but a feeble and inadequate protection from the claims of those who shirk the burden and the labor, and emerge only from obscurity to claim the fruit produced by the industry and perseverance of others.

The State should, therefore, protect her mining interests by such wholesome and just legislation as will, in the future, relieve it from the evils which have beset it in the past. Other instructions were given which were erroneous, but we do not deem it necessary to pass upon them, as the principles announced in this opinion sufficiently dispose of them.

Judgment reversed, and a new trial ordered.

Judge BEATTY having acted as counsel in this case, did not participate in the decision.

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2 26
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4 129

H. G. MAYNARD, APPELLANT, v. J. NEELY JOHNSON,
RESPONDENT.

An order setting aside a judgment by default is an appealable order, and if not appealed from, that order will not be reviewed after judgment on the merits.

Whether the Court was or not right in making that order in this case, quere?

When the Statute makes an instrument void or invalid it is proper to plead the statute specially.

At Common Law, a party could not plead his own fraud or violation of law as a defense to an action. But when the statute declares certain instruments

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shall be void, a defendant may plead the facts which make it void, although in so doing he shows a violation of law by himself. It being the policy of the law to allow such pleas to prevent the violation of the statute.

The defendant might plead the want of the proper stamps, if such deficiency of stamps rendered the notes invalid.

The Stamp Act of Congress does not declare any notes to be invalid for want of the proper stamps, except where omitted for the purpose of evading the law. [Overruled in opinion upon re-hearing.]

APPEALED from the District Court of the Second Judicial District, Hon. S. H. WRIGHT presiding.

Facts stated in the opinion.

Opinion by BEATTY, J., full Bench concurring.

George A. Nourse, for Appellant.

The Court below erred in setting aside judgment by default.

There was no evidence showing the judgment by default was "taken against him through his mistake, inadvertence, surprise, or excusable neglect."

The Court failed to impose the payment of costs as a condition precedent to setting the judgment aside.

See Laws of Nevada, 1861, pp. 324-5, Sec. 68. No affidavit of merits accompanied application to set judgment aside. *Hunter v. Lester*, 18 How. Pr. 347.

The Court erred in overruling demurrer to answer.

The answer only avers no stamps were affixed by the maker of the note, and those afterwards affixed were not canceled.

The law only makes instruments void when the stamps are omitted "with intent to evade the provisions of this Act." Act of June 30, 1864, Sec. 158.

It is also defective in not showing that the notes were incapable of being made good by affixing the stamps before trial. Byles on Bills, 91, 14 M. & W. 873, *Bradley v. Bradley*.

The Revenue Act, so far as it provides for rendering instruments void, must be construed strictly. 2 Parsons on Bills and Notes, Appendix, p. vii; *Smith v. Spooner*, 3 Pick. 229; *Sprague v. Birdsall*, 2 Cowen, 419; *Young v. McKenzie*, 3 Kelly, 31; *Mayor v. R. R. Co.*, 7 Geo. 22.

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Respondent cannot plead his own wrong in omitting the stamps. *Hughes v. Littlefield*, 6 Shep. 400; *Hollis v. Morris*, 2 Harring, 128; *Sumner v. Murphy*, 2 Hill S. C. 488; 2 Parsons on Contracts, 279; *Nichols v. Patten*, 18 Maine, 231; *Ayres v. Hewett*, 19 Maine, 281; *Jones v. Yeates*, 9 B. and C. 532; *Bessey v. Windham*, 6 Q. B. 166.

J. Neely Johnson and *R. M. Clarke* for Respondent.

Argued that it was the intent of the law-making power, expressed in Sec. 158, to make all instruments void which were not properly stamped.

The intent with which the stamps were omitted could only affect the enforcement of the penalty of \$200 for omitting stamps. The debates in both Houses of Congress were referred to in support of these views.

Opinion by BEATTY, J.

The facts in this case are, that in August, 1864, the respondent signed three several instruments in the form of promissory notes and delivered them to the appellant. When these instruments were delivered it would seem there were no revenue stamps placed on them by the maker nor by any one authorized so to do by him. When these notes or instruments were sued on they had attached to them certain revenue stamps, but not of the requisite amount or denomination required by the Revenue Act passed in June, 1864, and which, as to stamp duties, took effect on the 1st day of August, some eleven days before the notes were executed. These stamps were never canceled by the maker of the note. It does not appear from the transcript whether they were in any manner canceled. The complaint sets out the note *in hæc verba*. At the end of the first note, which was for \$2,500, payable in ninety days, are the words and figures (U. S. Rev. stamps, 42 cents); at the end of the second note, which was for same amount, payable in one hundred and fifty days, are the words and figures (U. S. Rev. stamps, 89 cts.); at the end of the third note, which was for \$3,200, payable in one hundred and eighty days, were the words and figures (U. S. Rev. stamps, \$1 02). None of these sums were sufficient under the law of June, 1864.

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Suit was brought on these notes in April, 1865. The precise day when the summons was served does not appear in the transcript. But on the 1st day of May, 1865, defendant obtained the written consent of plaintiff's counsel that he should have one day further time to demur, answer, or otherwise appear in the case. The next day defendant filed a paper in the case, which is in the form of a written motion asking the Court to quash the summons and copy of *complaint* served in the case, on the ground that neither the summons nor certificate of the Clerk to the copy of complaint was stamped as required by law.

On the 4th of May plaintiff caused default and judgment thereon to be entered up by the Clerk of the Court.

On the 11th of May, about one week after judgment had been entered by default, defendant and plaintiff's counsel signed the following stipulation :

" In above action it is hereby stipulated that the motion to quash summons and to set aside default and judgment be submitted to the Judge of said Court without oral argument, he to decide the same as soon as possible."

On the 15th of May a written motion asking the Court to set aside judgment, and also an affidavit setting out facts on which motion was based, were filed by defendant.

The Court set aside the judgment by default, but refused to quash the summons. The defendant was given five days to answer. He put in his answer, admitting that he signed and *delivered* the instruments set forth in the complaint. He then sets out the facts in regard to the want of revenue stamps as we have before stated them, and winds up with a denial that he *made* or *executed* the notes or instruments sued on, or that he is indebted thereon, &c.

The plaintiff demurred to this answer ; this demurrer was overruled ; the parties went to trial ; and defendant, having proved the facts as stated in his answer, the Court gave judgment for him, and the plaintiff appeals.

The first ground taken by the appellant is, that his judgment by default was improperly set aside ; that this Court should set aside the present judgment and reinstate the former judgment in the case.

The former judgment was set aside at some period between the

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15th of May and the 12th of June, 1865. The appeal in this case was taken on the 28th of August, 1865.

It will hardly be disputed that the order setting aside the judgment by default was an appealable order. From that order the plaintiff might have appealed within sixty days, but not after. If this Court could not reverse that order upon direct appeal after the expiration of sixty days, it seems to us it would be against all principle to attempt to review it in this appeal from another and distinct judgment. We think the question as to the regularity of the order setting aside the judgment by default cannot now be adjudicated. The propriety of that order involves many questions which we have not examined. Did the filing of a motion to quash the summons bar the right to take a default until that motion was disposed of? If not, was the belief on the part of defendant that it would have that effect sufficient excuse for his not answering or demurring, or getting his time for so doing extended? And should the default be set aside for this reason only? Is the affidavit of defendant in support of motion to set aside default sufficiently explicit as to merits and as to his belief that default would not, or could not, be taken until his motion was disposed of? Does not the complaint itself show that the notes were stamped with United States stamps of insufficient amount; that plaintiff was not entitled to any relief, and therefore justify the action of the Court below in setting aside the original judgment? These and several other points have presented themselves to our mind in connection with the order setting aside default and judgment. But, as we think that order is beyond our control at this time, we have not examined these points so as to come to any conclusion. We are not satisfied, by any means, that an error was committed in making that order, and if there was, it is too late to correct it now.

The question as to what was the effect of omitting the proper stamps when the notes were executed, is one far more difficult to determine. The statute itself is by no means clear, and we have not been referred to any English decisions which we think are applicable to the case before us. We have no access to the English statutes on the subject of stamp duties, and therefore are not certain as to their terms; but from recollection of what we have heretofore read, and from expressions in the English decisions

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before us, we judge they contained among other provisions the following in substance :

1st. Instruments in general not properly stamped, should not be *read in evidence*.

2d. Certain instruments, such as indentures of apprenticeship, (and possibly some others) were *absolutely void* if not properly stamped when executed.

3d. Certain commissioners were authorized, in case the stamps were left off of instruments which should have been stamped when issued, to stamp the same upon payment of a penalty by the party wishing to use the instrument.

4th. Whilst the commissioners were allowed to stamp most kinds of instruments, they were expressly forbidden to stamp others, such as bills of exchange under one Act, policies of insurance under another, etc.

Our statute makes no distinction between different classes of paper. It does not declare that unstamped paper shall not be received in evidence, but that under certain circumstances it shall be "invalid and of no effect."

The English Courts have held that a special plea to an action on an instrument not properly stamped, setting up that fact, was not a good plea, because it might be properly stamped between the time of filing the plea and the trial of the cause. See Byles on Bills, marginal page 91, and the case there cited. There was doubtless some reason for this. The statute does not declare such instrument void or invalid, but says it shall not be "pleaded or given in evidence" until stamped. You cannot raise an objection to evidence by plea, and the English Courts seem to have treated the word "pleaded" as having no force or effect, being in fact mere surplusage. In such case, the defendant pleaded *non assumpsit* or *nil debit*, and where the nature of the declaration required it, might plead *non est factum*. See Chitty's Pleadings, Vol. 1, page 483. At least, such was the practice under the old rules of pleading in England. What was the practice after the adoption of the new rules of pleading under the provisions of the statute 4th of William IV, we are unable to say. But when the statute makes an instrument void, or invalid, which is the same thing, doubtless the proper way to avoid it is to plead the statute. That is, to set

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out the facts, and aver that the instrument is void by reason of the statute. Such is the usual and proper defense against a note given for usury, gaming, etc., which are made void by the statute. See 1st Chitty on Pleadings, 484. And Lord Denman, an able Judge, in speaking of this very subject, says: "It is said, however, that Stamp Acts do not make a bill without a stamp void, but only forbid its being received in evidence. That may be so in some cases; but the nineteenth section of Statute 55, Geo. III, 184, expressly prohibits the reissuing a bill of exchange which has been paid, and inflicts a penalty of £50 on any person doing it. A bill issued contrary to such prohibition is certainly void. We think upon the whole that the facts may be so pleaded."

Whilst at common law a party could not set up his own fraud or violation of law as a defense or protection to himself, there is no question that when the statute declares an instrument void for any reason, the defendant who is sued on such instrument may show the facts that make it void, although in so showing he also shows that he has been guilty of some crime, fraud or violation of a penal statute. In such case, it is the policy of the law to prevent some particular practice, such as usury, gaming, violation of the revenue law, etc. To effect that object more completely the law allows the defendant to plead and prove his own wrongful act, not so much to protect the defendant as to carry out the policy of the law in suppressing illegal acts. We have no doubt the defendant might plead and prove the want of a stamp or the proper stamps to the instruments sued on, if the facts as pleaded and proved made them invalid.

The real question in the case is, does the omission of the proper stamps from promissory notes, made since the 1st of August, 1864, and prior to March, 1855, render such notes *prima facie* invalid?

Section 151 of the Act of June, 1864, provides that stamps of certain denominations shall be placed on various kinds of instruments, but fails to provide any penalty or forfeiture for using them without stamps.

Section 152 provides that instruments not properly stamped shall not be recorded; that the "record" of such instruments shall be "utterly void, and shall not be used in evidence."

Section 153 provides that no instrument shall be held "invalid

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and of no effect" if it has stamps of the requisite amount, although not of the particular kind or description designated for such instruments. This section seems to have been based on the supposition that there was some part of the law preceding this section which declared instruments void which were not properly stamped. But we can find nothing of the kind. We are inclined to think that when the Revenue Bill was framed, section 151 did contain some provision of this sort. That would appear to have been the most convenient place for such provision. It would seem natural and orderly after providing in section 151 for unstamped instruments being void, to provide in section 152 that they should not be recorded; that such recordation should be invalid, and of no effect.

An examination of the debates on this bill in the "Congressional Globe" shows that there was a great variety of opinions as to the best method of enforcing the Stamp Act duties. Some thought the law could only be properly enforced by making all instruments absolutely void that were not properly stamped when issued. Others, that such instruments should be *invalid until* properly stamped. Some were for allowing the parties to the instrument to cure the invalidity by attaching the proper stamps at any time subsequent to the making and delivery of them. Others, again, thought that if the stamps were not put on at the time of the execution of the instrument by the proper parties, they should only afterward be attached by a revenue officer: the parties wishing the stamps attached by the officer to pay for stamps, and a penalty of fifty dollars beyond the value of the stamps, unless he could satisfy the collector that the stamps were innocently left off at the time the instrument was executed, in which case the penalty might be remitted. But we believe that none thought the instrument ought to be available to the party holding it until it was properly stamped. Members having these conflicting views, a great many amendments were offered on this subject. Sometimes it was amendment to one section, and sometimes to another.

So far as we can see, the result of the various amendments has been to leave the law without any clause declaring instruments shall be invalid or void by reason of their not having stamps attached to them, except so far as they are declared void in section 158, which we shall now notice.

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Section 158 provides that if any person shall issue any note, bill, etc., without the proper stamps, "*with intent to evade the provisions of this Act*, [he] shall for any such offense forfeit the sum of two hundred dollars, and such instrument, document, etc., * * * shall be deemed invalid, and of no effect."

Here, then, is a clear provision that instruments issued *with intent to evade the law*, shall be invalid; but there is a total absence of any provision making them invalid unless they were issued with such intent. If, then, no instrument is to be held void and inoperative except those off of which the stamps were left, *with intent to evade the law*, it appears to us the defendant in this case could not set up any defense founded on the want of the proper stamps, without pleading that such stamps were omitted with intent to evade the Stamp Act. For this reason, we think the defendant's answer is insufficient. The facts found by the Court are likewise insufficient to justify a judgment for the defendant.

We are aware that in coming to this conclusion we are making a decision which renders the Revenue Law of 1864, so far as it relates to stamp duties, almost a dead letter. We are in effect holding that there is no adequate penalty for the violation of the law; but, if Congress has omitted to insert in the law any provision which would enforce obedience, it is not in the power of Courts to supply it. We can only enforce the law as we find it, not as we suppose Congress may have intended to make it.

In March, 1865, Congress passed an Act amending the 158th section, and providing the means of making instruments valid which were not properly stamped when issued. These amendments provide that any one having an interest in an instrument issued without the proper stamp, may have it stamped by paying for the necessary stamps, (and in some cases interest on the amount of the stamps) and paying, in addition thereto, the penalty of fifty dollars. This may be done without inquiry as to whether the stamps were or were not left off the instrument when issued, with intent to evade the statute. If the party wishing the stamps attached makes application before the expiration of one year from the issuance of the instrument, and can prove to the satisfaction of the proper officer that they were not left off with intent to evade the law, then the proper stamps may be attached without the payment of the penalty.

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Taking the section as it is amended by the Act of March, 1865, and it seems clear that Congress intended not only that all instruments requiring stamps should be held invalid when the stamps were omitted with intent to evade the law, but that in all cases where there was such an omission, it should be held and presumed that *it was* with intent to evade the law, until that presumption was rebutted by having the proper stamps attached in the manner pointed out by the Stamp Act. When the stamps are properly attached by a Revenue Collector, the whole question is settled. In other words, Congress has established the only tribunal before which the question can be tried as to whether the stamps were or were not innocently left off. We should probably hold that, under the amended law of March, 1865, that if on the trial of the cause, the instrument did not have the proper stamp, it should be held void. But this note was given long before the amendment was passed, and that amendment cannot be held to have such a retrospective action as to make a note invalid which was not so when executed and delivered.

The case must be reversed, and a new trial awarded; and it is so ordered.

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MAYNARD v. JOHNSON, UPON RE-HEARING.

In cases of doubtful construction, the debates of a Legislative body may be resorted to, to determine the meaning of a law. But this only in cases where the language of the law is so ambiguous as not clearly to show the meaning intended to be conveyed.

In interpreting doubtful statutes, the primary object is to ascertain the intent of the Legislature.

This intent is to be gathered, first, from the language of the statute, next from the mischiefs intended to be suppressed, or benefits to be attained.

If one clause of a statute is ambiguous, the whole Act is to be examined to explain or remove that ambiguity.

Considering the form in which the 158th section of the Stamp Act passed the Lower House of Congress; the amendment and proviso added thereto in the Senate; the effect which that amendment was admitted to have, both by its friends and opponents; the subsequent amendments of the law by an Act which gives a legislative interpretation to that section; and the general object and intention of the law—it seems more reasonable to construe the terms “such instrument” in the latter part of that section as referring to all

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unstamped instruments, rather than as being confined to those which were left unstamped with a fraudulent intent to evade the revenue.

The former opinion of this Court on this point is held erroneous, and it is held that notes issued under the Act of June 3d, 1864, not properly stamped, were void.

Opinion upon re-hearing, by BROSNAN, J., full Bench concurring.

A re-hearing was granted in this case, because the Court was not entirely satisfied as to the correctness of its former decision. We hoped that on a re-argument some more convincing reasons might be presented, calculated either to confirm the opinion heretofore expressed, or enable us to reach some other satisfactory conclusion.

The only question involved is one of statutory construction, arising out of the Act of Congress entitled "An Act to provide Internal Revenue to support the Government to pay interest on the Public Debt," etc., etc., approved June 30th, 1864.

The only point particularly urged on the re-hearing by the respondent was, that the debates in the Senate of the United States upon the passage of the Act showed clearly that the Senators gave to the law an interpretation different from that placed on it by this Court. And it must be confessed that so far as the intention of the Senate is to be gathered from the debates in that body, the respondent has successfully established his proposition. In case of doubt, and also where a statute will bear opposite meanings, either from inaptness of phraseology or an ungrammatical collocation of its several clauses, it is very usual to resort to the discussions of the legislators on the disputed point, with a view to the ascertainment of their intention. This is authorized and legitimate both in the interpretation of statutes and constitutions. Nevertheless, we think that Courts are not accustomed to give controlling weight to the views of legislators expressed in debate upon the point under discussion. Most certainly not whenever the language of the statute is so clear and explicit as that a fair, rational, and pertinent meaning can be derived from the terms used. It is not denied that the intention of the law-makers is first to be sought, but that is to be spelled out from the words they employ as the medium to express and convey their meaning. And although it be established doctrine at the present day that the right and duty to expound

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doubtful and ambiguous provisions of statutes devolve upon the judiciary, yet so important a subject is not committed to the arbitrary discretion of Courts or Judges. There are certain established rules of interpretation by which Courts are governed. We will apply some of these to the discovery of the fact or truth which we aim to grasp in the case under consideration.

When a statute is of a doubtful meaning, the first thing is to ascertain the intention of the Legislature that framed the Act; next, the course to be pursued to compass that result.

The intention of the Legislature must be found, if possible, within the statute itself—that is, in the words which the Legislature has employed. Outside of the statute, we are to consider the mischiefs it was intended to suppress; or, as the case may be, the object or benefits to be thereby attained.

Another well-settled rule is, that where a cause of doubt exists, although it attaches only to a particular word or clause, the whole statute is to be taken together, and so examined as to arrive at the intent, if possible.

With these rules in view, we proceed to inquire into the object of the statute under examination, and whether it does not contain within its terms and parts intrinsic and satisfactory evidence of the intention of the framers of the law.

The question of doubt arises on the construction of the 158th section of the Act, which reads:

“That any person or persons who shall make, sign, or issue, or who shall cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, or shall accept or pay, or cause to be accepted or paid, any bill of exchange, draft, or order, or promissory note, for the payment of money, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the duty chargeable thereon, with intent to evade the provisions of this Act, shall, for every such offense, forfeit the sum of two hundred dollars.”

In this shape the section passed the House. In the Senate, Mr. Fessenden proposed to add the following amendment to it:

“And such instrument, document or paper, bill, draft, order, or note shall be deemed invalid, and of no effect.”

In the discussion that arose upon this amendment it was assumed,

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rather expressly conceded, by all the Senators who spoke to the question, that the effect of the amendment would be to make void all instruments requiring a stamp that were not stamped when executed. This fact or result, we say, was conceded by all the Senators who expressed opinions on the subject, whether they spoke in favor of or against the amendment, and whether the stamp was omitted through neglect, mistake, or inadvertence.

To obviate this harsh result, Senator Hendricks of Indiana offered a further amendment, so much of which as is necessary for the purposes of the argument is in the following words :

“ Unless subsequently duly stamped, which may be done by the holder or other person interested therein, if the proper party refuses or is unable to do so.”

The amendment of Mr. Hendricks was debated by himself and Senators Fessenden and Reverdy Johnson, and they all again admitted that without the amendment of Hendricks, the effect of Mr. Fessenden's amendment would be to invalidate all instruments not properly stamped, irrespective of the inquiry or question whether the stamp was omitted innocently or negligently, or with intent to defraud the revenue.

The amendment of Senator Hendricks was rejected, and upon motion of Senator Collamer, the following proviso was annexed to the section :

“ *Provided*, That the title of a purchaser of land by a deed duly stamped shall not be defeated or affected by the want of a proper stamp on any deed conveying said land by any person from, through or under whom his grantor claims or holds title.”

In this shape, and with this understanding of its effect by Senators, so far as we have any evidence, the section under consideration (section 158) passed the Senate ; and in the identical words incorporated therein by the Senate we find it a law approved.

Thus far, then, the opinions of the law-makers furnish a key to a correct interpretation, which is but another word to express their intention, respecting this particular enactment. Yet, as we have before said, these considerations, though necessarily of weight in reaching an enlightened judgment, ought not, and will not, control the Court, if the express terms of the Act explicitly declare a

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different meaning or conclusion from that which these Senatorial opinions indicate.

In our former opinion we interpreted the words "such instruments" as meaning instruments left unstamped with intent to evade the provisions of the law. Though we make no pretensions of being formidable grammarians, we do not hesitate to say that, in view of the arrangement and connection of the clauses of the section particularly under review, and the terms employed, the words "such instrument" may be held to relate to instruments left unstamped with a fraudulent intent. The former opinion hinged upon that construction, and that, too, we repeat, without any strain of the language used. But upon further assiduous examination and reflection, we incline to the belief that the Court erred. That such interpretation, though supported by grammatical rules, was too narrow and restrictive, and was calculated to defeat, in a great measure, the object of the law as being opposed to the express intention of the framers. The law was designed to raise revenue to support the Government and pay the interest on the public debt. This, incontrovertibly, was its main object and use. This object, it must be presumed, was ever present to the minds of the members of Congress, and imparted color and direction to their deliberations and actions while they had the subject matter under advisement. The exigencies of the times, as is a matter of historical and painful recollection to all good citizens, required that the contributions of all who claimed the protection of the Government should be as bounteous as their means would justify and the necessities of the national exchequer would demand. The Congress of the United States, if actuated by a throb of patriotic emotion, which is not questionable, could not be, was not indifferent to this condition of affairs. Impressed by these influences and considerations, they passed the law, from the bowels of which we seek to eviscerate its meaning. *Evisceribus actus*. What is its true meaning? By applying the words "such instrument" to those instruments from which are evasively or fraudulently omitted the required stamps, you leave all dependent upon the recovery of the penalty of two hundred dollars. But it must be a fact patent to all reflecting minds that no penalty regarding revenue stamp duties will protect the revenue. Nobody is interested to enforce the penalty, and in

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one case in one hundred where an infraction of the law was committed the penalty would not be recovered. Suppose the law were that the instrument could not be used (sued upon, if you please) until stamped, let us consider how many thousands of instruments that require a revenue stamp would never come into a Court of justice. To this extent the revenue is lost. The oldest lawyer, perhaps, has not had two suits upon bank checks, yet they are drawn by tens of thousands daily. So of notes.

Suppose the penalty alone was enforceable, who shall determine the question of fraudulent intent? How can it be proved? How or when shall it be determined? How many cases of the kind will ever be tried? But, again, if the instrument should pass unstamped through the hands of several parties, who of them or how many of them shall you sue to recover the penalty? Shall it be one, or two, or more penalties, commensurate with the numbers of persons through whose hands the instrument has commercially passed? In fact, this amendment of Senator Fessenden was inserted *ex industria* from abundance of caution, to secure a larger revenue; and there is no hardship in it, after all. Every man is bound to know the law in other matters as well as in this. Its object was to stimulate vigilance and attention, and thereby increase the revenue. Without it, the amount of revenue from that source would be nominal. With it, millions would flow into the National Treasury. In short, the construction placed upon the Act by appellant's counsel would effectually defeat the object of the law.

But we proceed to a closer scrutiny of the language of the Statute, and to a comparison of its several parts, to see if we cannot find in its very terms a meaning corresponding with the opinions of Senators, and with the views foreshadowed in the language above expressed.

Section 158 will warrant the following interpretation. It contains three propositions:

The first, that which it transported in its passage from the House into the Senate, to wit: That the penalty only should be visited upon the omission to attach the stamp to the instrument, document, or paper.

Secondly, an independent proposition, to wit: The amendment of

Mr. Fessenden, superadded to the penalty, for the more certainly securing the greater revenue.

Thirdly, the proviso of Senator Collamer.

Speaking for myself, I am inclined to the belief that, without the amendment of Senator Fessenden, all such instruments as are described in section 158, if unstamped, would be void, if the intent to defeat the provisions of the Act were proved, and there was no saving clause in the Statute to obviate that result. And this from the fact that such an instrument stands in antagonism to the policy of public law. But I express no decided opinion upon this point, because I have not taken time to examine it, and I do not deem it necessary to the decision of the case before the Court. The words "such instruments" I hold may relate, and in this instance do relate, to all instruments not stamped, mentioned in the section, no matter from what cause the stamp may have been omitted. This construction harmonizes not only with the understanding of the law-makers, but also with the proviso of Senator Collamer, and with other sections of the Act. The proviso of Mr. Collamer was intended to save an innocent *bona fide* grantee, who had himself personally complied with the law. To make "assurance doubly sure," the honorable Senator intended that the innocent grantee should not be divested of his title because of the fraud or delinquency of any one of his predecessors in the course of transferring the title. But if all unstamped instruments were not intended to be held void, the proviso would seem to be unnecessary. For I hold that a man is not chargeable with the consequences of a fraud unless he participates in some way in its concoction or perpetration.

But let us refer to other sections of the Statute, because we are bound, in expounding a statute, to give every part of it effect, if possible, and to construe one part of the legislative enactment by the light we derive from other parts.

In section 152 of the Act under consideration, it is made unlawful to record any instrument, document, or paper required by law to be stamped, unless a stamp of the proper amount shall be affixed. And the *record* of such instrument not having the proper stamp or stamps, shall be utterly void, and shall not be used in evidence.

Again, section 153 of the same Act ordains: "That no instrument, document, writing or paper of any description, required by

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law to be stamped, shall be deemed or held invalid and of no effect for the want of the particular kind or description of stamp designated for and denoting the duty charged on any such instrument, document, writing, or paper; provided, a legal stamp or stamps denoting a duty of equal amount, shall have been duly affixed and used thereon." There is a proviso we need not quote.

After reading these sections of the Act, independently of the views and opinions of the legislators heretofore stated, can it be reasonably claimed that this law does not make all instruments described in it void unless legally stamped, or unless, as provided for in section 153, they bear a stamp denoting a duty of equal amount to the stamp specifically prescribed for use on each particular instrument? If so, the sections contradict one the other. Take it that all the instruments mentioned in section 158, if unstamped, are invalid, and these sections are in perfect harmony and unison. Why shall the *record* of an instrument be held "utterly void," as declared in section 152, if the instrument be unstamped, and the instrument itself not be equally void? Why shall an unstamped instrument "be held invalid and of no effect," as denounced in section 153, if the same instrument be held valid under section 158 of the same Act, as contended for by the appellant's counsel? Such a construction would make the statute incongruous and contradictory.

Again, the Act was not to take effect until the first day of August following. This was certainly intended to apprise parties, to familiarize the public with the law, so that they may guard against its operation and effect. Furthermore, the Act saved all unstamped instruments previously executed and delivered, as will be seen by reference to section 163. That section, among other things, contains the following proviso: "That no instrument, document, or paper, made, signed, or issued prior to the passage of this Act, without being duly stamped, or having thereon an adhesive stamp or stamps to denote the duty imposed thereon, shall for that cause, if the stamp or stamps required shall be subsequently affixed, be deemed invalid and of no effect."

We think the inference legitimately deducible from this legislation is, that Congress intended that all unstamped instruments executed after the Act of 1864 should take effect, no matter with what intent, or from what cause, the legal and requisite stamp or stamps may

have been omitted, should be invalid and of no effect. Hence, we conclude that the Act upon its face manifestly indicates the intention of its framers.

There seems to be no question that the Congress of 1865 understood the Act of 1864 as we now read it. On the third day of March, 1865, an Act was passed amendatory of the Act of June 30, 1864. The Act of 1865 amended section 158 of the law of 1864 so as to reduce the penalty to fifty dollars, and annexed to section 158 provisos by which unstamped instruments may be made valid. This is forcible evidence of the fact that the Congress of 1865 understood the Act of 1864, as Senator Fessenden and his associate Senators understood it, namely: that it annulled all instruments not legally stamped made during the time the Act was in force. Vide Act of Congress passed March 3d, 1865, section 158. And we are authorized to resort to this subsequent legislation as one of the means outside of the statute to arrive at its true intent and meaning. If it can be gathered from a subsequent statute, *in pari materia*, what meaning the Legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning, and is entitled to great weight in the construction of the first statute. *Morris v. Mellin*, 6 Barn. and C. 446 *et seq.*

Finally, though there may be doubt as to the meaning and application of some word or clause in a statute, yet if the intention of its framers be apparent, that intention must control the construction of the Act. Under this rule it results that statutes are very often construed against their letter; that words are sometimes expunged, other words supplied, to carry out the object of the law. The books teem with instances of this character. We hold the following propositions to be well-settled and established law:

Where the words of a statute are obscure or doubtful, the intention of the Legislature is to be resorted to in order to discover their meaning. A thing within the intention is as much within the statute as if it were within the letter; and a thing within the letter is not within the statute if contrary to the intention of it.

So, again, such construction ought to be given as will not suffer the statute to be eluded. *People ex rel. etc. v. U. Ins. Co.*, 15 J. R. 358, 380; 3 Cow. R. 89; 21 Wend. 211; 13 Mass. 518; 8 Pick. 516; *Henry v. Tilson*, 17 Ver. 479.

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After an earnest effort to reach the truth, and, therefore, a just judgment in this case, in view of the terms of the statute under examination, as well as the manifest object of it, and the legal rules established for the interpretation of laws, we have become satisfied that the Court reached an erroneous conclusion in its former opinion. Having thus determined, though exceedingly reluctant to declare the instruments set out in the complaint void under the law, we cannot hesitate to reverse our former ruling in obedience to our clear conviction.

Our first decision is accordingly set aside, and the judgment of the District Court will stand affirmed.

JASPER N. KILLIP, ADMINISTRATOR OF JAMES M. KILLIP,
APPELLANT, v. THE EMPIRE MILL CO., RESPONDENT.

When notice of intention to move for new trial is served within two days after judgment, and followed up by statement, &c., as the statute prescribes, the Court retains jurisdiction of the case so far as to be able to dispose properly of the motion for new trial, although the Court may have adjourned for the term between the day judgment was rendered and the filing of notice without making any order continuing the jurisdiction over the case.

But if the term expires, and no notice of intention to move for new trial is filed within the statutory time, then the Court loses jurisdiction of the case.

A mere verbal notice, given out of Court in conversation with counsel of the successful party, that a new trial will be moved for, is not sufficient. It must be in writing, or in open Court, and a minute made of it.

The facts in this case do not show any waiver of service of the notice.

It is not the duty of counsel to inform their opponents that they are about to omit some steps in the proper management of their side of the case.

The Court, having lost jurisdiction of the case by the lapse of time, and the failure of respondent to file notice of intention to move for new trial within two days after judgment, could not restore its jurisdiction by an order allowing the notice to be filed *nunc pro tunc* as of a former day.

Could the Court have made such an order even during the continuance of the term at which the judgment was rendered? *Quere.*

A revenue stamp may be affixed to the notice of appeal even after motion to dismiss. When affixed, it renders notice operative from the time of filing.

The appeal here was properly taken from the order granting a new trial, rather than from the order allowing notice to be filed *nunc pro tunc*.

It is not necessary to appeal from a void order which can have no operation or effect.

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Extending the time for making statement, under the circumstances of this case, cannot be construed as a waiver of notice of intention to move for new trial. The sixty-eighth section of the Practice Act does not provide for the granting of such relief as was attempted to be granted by this *nunc pro tunc* order.

A Court of Chancery may relieve from a judgment at law, after the law Court has lost all jurisdiction.

But it must be upon a bill filed in a proper case. This equitable relief cannot be granted on motion.

APPEAL from the District Court of the First Judicial District,
Hon. RICHARD S. MESICK, presiding.

The facts are stated in the opinion.

Tod Robinson, for Appellant, made the following points :

First—The Court had no power to set aside the verdict and its judgment after the adjournment of the term. (*Baldwin v. Kramer*, 2 Cal. 583 ; *Morrison v. Dapman*, 3 Cal. 255 ; *Shaw v. McGregor*, 8 Cal. 521 ; *Robb v. Robb*, 6 Cal. 22 ; *Suydan v. Pitcher*, 4 Cal. 281 ; *Castro v. Richardson*, 25 Cal. 49.)

Second—It is not competent for a Court to supply the deficient acts of parties by an order *nunc pro tunc*. This order is only to supply errors, oversights, or omissions of the Court. (*Gray v. Brignardello*, 1 Wallace's Reports U. S. S. C. 627 ; *De Castro v. Richardson*, 25 Cal. 49 ; *Hegeler v. Henckell*, 27 Cal. 492.)

Third—The Practice Act, section one hundred and ninety-five, provides the modes and conditions on which a new trial can be had, and this provision, like every other regulation of that Act, is exclusive. (*Hamilton v. Smith*, 21 Cal. 134.) The injunction of that Act is, that a party wishing to move for a new trial must—first, give notice of his intention to the opposite party ; second, he must, after notice has been given, file and serve a statement of facts ; third, after he has given the notice and served his statement, he is then entitled to make his motion. (*Jenkins v. Frink*, 27 Cal. 338, 339.)

In California, without exception, they have held that an omission to comply with the provisions of the Act in any one of the particulars is a waiver or loss of the right to move for a new trial. (*Cany v. Silverthorne*, 9 Cal. 67 ; *Mahoney v. Caperton*, 15 Cal. 313 ; *Allen v. Hill*, 16 Cal. 113 ; *Munch v. Williamson*, 24 Cal. 169 ; *Easterby v. Larco*, 24 Cal. 179 ; *Bear River Co. v. Boles*, 24

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Cal. 354; *Plateau v. Lubeck*, 24 Cal. 364; *De Castro v. Richardson*, 25 Cal. 49; *Ellsassar v. Hunter*, 26 Cal. 279; *Hegeler v. Henckell*, 27 Cal. 495; also the case of *Rowe v. Bacellagupe*, which is not reported.)

L. Aldrich and *C. J. Hillyer*, for Respondent, made the following points:

First—The appeal should be dismissed for want of a stamp on notice of appeal. (Statutes of 1865, pages 127, 132, and 323.)

Second—This Court cannot reverse the order allowing notice of intention to move for a new trial to be filed "*nunc pro tunc*," because it is a special order, made after final judgment, and should have been directly appealed from. (Statutes 1861, p. 363, § 285; Statutes 1861, p. 302, § 281; *Henly & Hastings v. Hastings*, 3 Cal. 341; *Gilman v. Contra Costa County*, 8 Cal. 52.)

Third—The provision of the statute requiring a notice of intention to be given of the motion for a new trial does not require that the notice should be in writing. (Statutes 1861, p. 346, § 195.)

Fourth—The object of the notice of intention to move for a new trial was accomplished. The motion itself, and the grounds on which it is based, are the essential parts of the proceeding, the notice being intended merely to advise the adverse party of the proceeding and to bring him into Court. (*McLeran v. Shartzer*, 5 Cal. 70; *Williams et als. v. Gregory*, 9 Cal. 76.)

Fifth—It appears in the case that the failure to serve a written notice of intention to move for a new trial was the result of mistake, inadvertence, or excusable neglect, and the Court had the right to relieve respondent by ordering that the notice might be filed *nunc pro tunc*. (Statutes 1861, p. 324, § 68.)

Opinion by BEATTY, J., LEWIS, C. J., concurring.

The plaintiff in this case brought an action, in the nature of an action of ejectment for an undivided interest in a certain piece of mining ground. The plaintiff claimed to derive his title from a deed executed by one Clark to J. M. Calip.

The defendants claimed to derive title from the same Clark, and averred that when the deed was made by Clark, the name of J. M.

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Killip or *Calip* was inserted therein by mistake ; that it should have been made to one Rice, from whom defendants derived title. Defendants made their answer in the form of a cross complaint, and demanded a reformation of the deed from Clark, so that the name of Rice should be inserted in lieu of J. M. Calip. This cross complaint of defendant seems to have been first disposed of by the Court refusing to reform the deed. After this determination of the case by the Judge acting in the capacity of chancellor, the case in ejectment was submitted to the jury, and they rendered a verdict in favor of plaintiff, and a judgment was therein entered. Subsequently, the Court below made an order granting a new trial, and from that order an appeal was taken to this Court.

The appellant contends that this case cannot be heard on its merits, for the reason that no motion for new trial was made during the term at which the judgment was rendered, nor any order made during the term extending the time for making such motion or continuing the jurisdiction of the Court over the case.

And for further reason, that no notice of intention to move for a new trial was given within the time prescribed by statute. The facts on which these propositions are based are as follows :

The verdict of the jury was rendered, and the judgment entered, on the first day of March, 1865. On that day the Court was adjourned for the term. On the second day of March, 1865, one of the counsel for respondent, A. W. Baldwin, Esq., prepared a notice of intention to move for a new trial to be served on the opposite counsel, but by some oversight this notice never was served. After the verdict and judgment, (the affidavit of Baldwin says the first of March, that of Foster fixes it the third of March) Baldwin and Foster, one of counsel for appellants, met, and some conversation took place about the preparation of a statement for new trial.

The version of this interview differs slightly as given by Baldwin and Foster. But Baldwin, either directly or by implication, informed Foster of his intention to move for a new trial, and asked an extension of time to file his *statement* on motion for a new trial. Foster did not object to the extension of time, but referred Baldwin to Judge Bryan, an associate counsel, for the signing of any requisite stipulation, as he did not desire to sign any. Bryan was then

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applied to, and he declined to act, but referred the counsel of defendant to Judge Robinson, a third counsel for plaintiff. A written stipulation in these words was sent to Judge Robinson's office: "By stipulation in the above cause, the defendant is allowed an extension of fifteen days wherein to file a statement on motion for a new trial."

About noon of the third day of March, Robinson brought this stipulation to the office of defendant's counsel, and declared he could, or would not sign that stipulation, but did agree to draw up one to suit himself, says Baldwin, and sign it.

Robinson says he assured Baldwin he had no objection to his taking the fifteen days, and would take no advantage of his failure to file statement, in less than fifteen days. But he had not been able, as yet, to draw a stipulation satisfactory to himself, and was afraid he could not. That he was afraid some inference might be drawn, from signing the stipulation, prejudicial to his client's rights. These statements differ slightly; but taking them both together, and it is evident Robinson was willing to give the time required, but unwilling to waive anything by so doing. Between the third and sixth, another application was made to Robinson to sign the stipulation, or some stipulation to extend the time, and, on his declining to do so, application was made to the District Judge to extend the time for filing the statement. This order he made on the sixth of March.

On the 11th, for the first time, Baldwin discovered his notice of *intention* to move for a new trial had been overlooked by his clerk, and not served.

Application was then made, on proper notice to the Court, for leave to serve this notice *nunc pro tunc*. In time, this order was made. Had the Court, under this state of facts, any jurisdiction over the case, and the right to grant a new trial?

The first point of appellant is, that the Court lost jurisdiction over the case by adjournment, without making any order for retaining the case within its jurisdiction, either for the purpose of hearing a motion for a new trial, or for any other purpose. The general principle contended for by appellant is undoubtedly correct. But, we think, the statute operates to continue the jurisdiction of Courts in all cases where the judgment is followed by notice of intention to move for new trial, statement on motion, etc., made within the re-

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spective times prescribed by statute. Certainly, under ordinary circumstances, if no notice of motion for new trial is made within two days after rendition of judgment, and the Court has, in the meantime, adjourned, all jurisdiction of the Court over the case would be gone ; the statute makes one exception : the Court may, within six months after the rendition of judgment, where summons was not served on defendant, set it aside. So, too, the Court may correct errors, supply defects, etc., in its judgments, where there is something in the records or minutes of the Court whereby to make the corrections or supply the defects.

In this case, the judgment was on the first day of March and the adjournment on the same day. If, before the end of the third of March, there was no notice of intention to move for a new trial, no waiver of that notice, and no act which was equivalent to notice, then the Court lost jurisdiction of the case.

First, was there a notice such as the statute requires ? The Practice Act, section 195, requires a notice of intention to move for a new trial to be given within two days after trial, and within five days thereafter the necessary statement or affidavits to be filed, etc. This section does not, in terms, require the notice of intention to be given in writing ; but the act requires each of these things to be done within a specified time. If the notice is not given in writing, as a matter of practice, it would be extremely difficult to determine, with certainty, the date at which such notice was given, and the result would be a great temptation to perjury and misrepresentation of facts, and uncertain and unsatisfactory records. This Court would frequently be compelled to weigh testimony and determine doubtful facts, when, under a proper practice, no such doubt could arise.

If, then, this were a new point, never decided by any former tribunal, we should hesitate long before we would hold that a mere verbal notice would be sufficient. More especially would we be unwilling to hold that a mere casual observation, not intended to operate as a formal notice, but merely as an introduction to another subject, should be held as a sufficient notice. In this case it is not pretended by Baldwin that his observations to Foster were intended to operate as a notice. When he made those remarks to Foster about his intention to move for a new trial, he thought his clerk had

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already served, or would in due time serve the written notice of intention. Whatever he said on this subject was merely as introductory to his request for extension of time to prepare statement on motion for new trial. It was not intended as a formal notice. But we are not without decisions on this subject. We think it has been repeatedly held that, when a statute requires a notice to be given in the course of any judicial proceedings, and the mode of giving it is not pointed out, it must be given in such way as to preserve some tangible evidence of a compliance with the law. Sometimes it has been held or intimated that such notice could not be given in writing. In other cases it has been held, that a notice given in open court, when entered on the minutes kept by the clerk, might be sufficient if such minutes showed all the necessary facts, such as the form and date of notice, the presence of the party in court to whom the notice was given, etc. But this, we think, is as far as any court has gone in dispensing with a written notice. See *Borland v. Thornton*, 12 Cal. 440; *Bear River Co. v. Boles et al.*, 24 Cal. 354.

Secondly: Was there any waiver by appellants to excuse the non-delivery or service of notice of intention to move for a new trial? Usually a person waives a right in one of two ways: as by express declaration of intention to waive a right, or some act equally indicative of such intention; or, on the other hand, by some act or declaration which has induced another party to think he has waived his right, and induce the other party to act on that supposed waiver. In this latter case, the waiver is a species of estoppel. Does this case come within either of these classes? When Robinson refused to sign the stipulation prepared for him at the office of Baldwin, (whether we take the version given by one or the other of those gentlemen) if it shows anything, it shows this: that Robinson was willing to give the extension of time for the preparing of a statement, if he could do so without waiving any right of his client in other respects; but was determined to be very guarded in signing any stipulation to that effect, not to waive other rights. Certainly there could have been no other objection to signing the stipulation proffered, except the fear of its being treated as a waiver of something else.

Did the conduct of Robinson induce the other side to do any

material thing, or refrain from doing anything necessary to preserve their rights? He certainly did not induce respondents to do any affirmative act to change their condition. He did not do anything to prevent their serving their notice of intention. Baldwin acted on the belief it was served. Robinson's conduct was not calculated to induce Baldwin to omit the making of service; but his hesitation, his expressed fear of waiving some right, should have put Baldwin on his guard, and induced greater vigilance. He evidently saw Robinson conceived his client had some legal advantage, which he would not waive. If Baldwin had never seen Robinson still the notice of intention to move would never have been served.

Their interview did not cause the paper to be covered up on the table of Baldwin's clerk.

From the earnestness with which the appellants argued the proposition that the Court having adjourned without making any order keeping the case open for motion for new trial, that it lost jurisdiction thereof at the end of the term, it would seem most probable that Robinson's objection to signing the stipulation about the time for making a statement had reference to this point. Supposing the Court had lost jurisdiction of the case, he did not want to invest the Court with any new powers by signing the papers presented to him.

But admitting that he was aware Baldwin had not served any notice of intention to move for a new trial, and possibly might not do so if he was not reminded of his duty in this respect, was it Robinson's business to remind him of his failure? Should he, when at Baldwin's office at noon, on the third day of March, have said, "you have not yet served us with any intention to move for a new trial?" Had he done so, would it not have been a gross violation of his duty to his own client? We cannot think it the duty of counsel to inform their opponents of any omission they are about to make in the management of their side of the case.

We are clear, then, that this case is unaffected by the conduct or declarations of Robinson and Foster, at their several interviews with Baldwin.

Leaving these acts and declarations out of view, and the simple question is, whether the Court, having lost jurisdiction of the case at the end of the third of March, that jurisdiction could be restored by an order allowing respondents to serve a notice in the month of

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May, which should, under the order of Court, take effect as if it had been served on the third of March preceding.

We think that the very statement of the proposition shows how it should have been determined. If the Court had lost jurisdiction of the case, the order itself was made by a tribunal having no jurisdiction, and was a nullity. If the Court could, by such an order as this, restore its own jurisdiction, it might, when a party brings a suit on a note barred by a statute of limitation, make an order that when the clerk filed the complaint he should file it *nunc pro tunc*, as of some former date, so as to be within the statutory time for bringing the action. So, too, if a party failed to file his notice of appeal within one year after judgment, the Court might on the same principle direct the clerk to date the filing as of some former day, so as to bring it within one year. The Court cannot by an order *nunc pro tunc* repeal or suspend the operation of a statute.

In this case the whole proceeding on motion for new trial was an absolute nullity, for want of the service of notice of intention to move for a new trial within the two days limited by law. If the oversight in serving the notice had occurred and been discovered during term time, it is not necessary here to determine whether the Court could have relieved the party from the effect of this inadvertence or mistake.

Respondents move to dismiss this appeal because the notice of appeal had no State revenue stamp upon it. The law on this subject is not very clear, yet we think it apparent that it was not the intention of the Legislature to make any instrument void for want of a proper stamp, but simply to render them invalid and ineffectual until the stamp was affixed. When the stamp is affixed, then the instrument is to take effect from its date. We have held several times on preliminary motions to dismiss appeals for want of stamps on notice of appeal, that the stamp might be affixed after motion made. We allowed that course to be pursued in this case, and think it the proper practice.

There was no necessity for the appellant to appeal from the order allowing the notice to be filed *nunc pro tunc*, for the reason that the order was a nullity, and could not affect them. If it had been an order which the Court had a right to make, and it had merely been a question whether that right was exercised with proper discretion,

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the only way to review that discretion would have been by appeal from the order. But the order itself being a nullity, and not affecting the rights of appellant, there was no necessity for an appeal. When an appeal is taken from an order granting a new trial, this Court must ascertain from the record whether the Court below had the power to make such order.

Respondents contend that appellant verbally extended the time for filing statement, and thereby waived the service of notice of appeal, and refer to *M. Swan v. Shulzer*, 5 Cal. 70, and *Williams et al. v. Gregory et al.* 9 Cal. 76. If those cases are authority, of which we have some doubt, they are very different from this. The conduct of respondent in each of these cases was such as to show he acquiesced in the omission of the notice. In the first case he appeared in the County Court and contested a motion for a continuance, without any objection to the sufficiency of the notice of appeal. In the latter case the respondent filed a counter statement, etc., after the statement was filed.

Here appellant filed no counter statement, did not appear to contest the motion for new trial, nor do any act to waive his rights, except to express his willingness that respondents might have fifteen instead of five days within which to file statement, and accompanying this verbal agreement was a clear intimation that it must not be construed as waiving anything. When this agreement for extension was made, the time for serving notice had not expired. Surely if that agreement waived any past omission, it would hardly be construed as waiving a thing which might be done in the future, and ought to have been done thereafter, even if Robinson had signed the stipulation offered to him.

Respondents contend that the Court was authorized to grant relief from the effects of their omission to serve notice by the provisions of the sixty-eighth section of the Practice Act, and they quote and italicise the following language in that section: "The Court may in furtherance of justice * * * *relieve a party, or his legal representatives, from a judgment, order, or other proceedings taken against him through his mistake, inadvertence or excusable neglect.*" The order here did not relieve respondents from any judgments, etc., taken against them by mistake, inadvertence or excusable neglect. The judgment was upon a full trial, and not as the result

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of any omission of respondents. They do not ask to be relieved directly from any judgment or order against them. They ask to be placed by the order *nunc pro tunc* in a situation to take some step against the appellant.

The evident object of this statute is to relieve a party from the effects of some judgment or order made by the Court in its regular proceedings; not to give a party some affirmative right which he has lost by his own conduct, but in regard to which the Court has made no order whatever.

We have made no examination of this case so far as the merits are involved. For such purpose the case is not before us.

This is simply an appeal from an order granting a new trial, and the District Court had no jurisdiction of this case for such purpose.

The order for a new trial is set aside, and the original judgment restored.

JASPER N. KILLIP, APPELLANT, *vs.* EMPIRE MILL AND
MINING CO., RESPONDENT.

RESPONSE TO PETITION FOR RE-HEARING.

A Court of Chancery, by a proper proceeding and in a proper case, may set aside a judgment rendered by a Common Law Court; but relief is granted on the very ground that the Law Court has lost jurisdiction of the case, so that it cannot afford the proper remedy.

Opinion by BEATTY, J., full Bench concurring.

In this case a petition for re-hearing has been filed, which is based on two grounds:

First—That this Court erred in holding that the District Court had lost *jurisdiction* of the case before the order granting a new trial was made.

Second—That a verbal notice of intention to move for a new trial is sufficient.

In support of the first point, counsel lay down these propositions:

“1st. That a Court will not, after the adjournment of the term,

correct or amend its judgments or records, except in clerical matters or matters of form.

"2d. That a Court of general jurisdiction, notwithstanding the foregoing rule, will, on proper proceedings instituted before it, allow its judgments at a former term to be attacked; will grant injunctions to restrain their execution; will set them aside for fraud; and maintain a jurisdiction over them to inquire into the circumstances under which they were rendered."

These propositions are in some sense correct, when applied to Courts having both common law and chancery jurisdiction. In other words, the equity side of the Court will, upon a proper showing in a bill filed for that purpose, set aside a judgment previously rendered by a Common Law Court. So, too, on a proper showing in a bill of review, it will set aside or amend a decree rendered at a former term of the same Court. But these proceedings are based on the express theory that the Court has lost jurisdiction of the former case. A Court of Chancery relieves from the effect of a judgment at law only because the Law Court has lost jurisdiction, and cannot afford the relief sought. This was not a proceeding in a distinct case in equity, but a proceeding in the Law Court, which had lost jurisdiction of the case—or, rather, lost jurisdiction over the judgment. Even after judgment and term expired, the Court, for certain purposes, retains jurisdiction. It has jurisdiction to control the execution and subsequent proceedings, but no jurisdiction to alter or control the judgment, except in certain specified cases, when the statutes give such jurisdiction.

We are satisfied, as before held, that the Court, before it made the order for filing a notice *nunc pro tunc*, had lost all jurisdiction over the case for this purpose.

In relation to the second point, counsel argue that the two authorities cited in support of the proposition that a verbal notice of intention to move for a new trial is insufficient, ought not to be relied on as authoritative on that point.

In relation to case cited from 12 Cal. 440, it is contended that it should not be held as good authority, because counsel for appellant in that case makes an erroneous quotation from the Practice Act, which may have misled the Court.

We do not think that counsel in the case of *Borland v. Thorn-*

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ton assumed to quote section 517, but merely stated in their points what they assumed to be the operation and effect of the statute. We are satisfied, from the language used by Judge Field, that he was not misled in the matter. He says in his opinion: "Where the statute speaks of notice it means written notice, or notice in open court, of which a minute is made by the Clerk." When the Judge wrote this opinion he must have been fully aware the statute spoke of "notice" generally, for if the statute had read "written notice," there certainly would have been no necessity for saying "*written* notice means *written* notice." It is clear that it was the opinion of the Judge who wrote that opinion, that where a statute requires a "notice" to be given in judicial proceedings, it shall be held to mean either a written notice or one given in open court and entered on the minutes of the Court.

Counsel contend that the case in 24 Cal. is not a reliable authority, for the reason that the same Judge who says: "The law provides that notice of a motion for a new trial shall be given, and the notice intended is a written notice," afterward says: "At best, it is a doubtful question."

True, the Judge who rendered that opinion says it is "a doubtful question" whether a notice given in open Court, and entered on the minutes of the Court by the Clerk, might not be as effectual as a written notice. But the Judge never expressed a doubt about the effect of a mere *verbal* notice. Upon that subject he expressed no doubt. He was satisfied such notice would be insufficient. This Court agrees with the learned Judge who rendered that opinion, fully. The verbal notice is insufficient. The other is a doubtful question, and we have not decided it.

The re-hearing is denied.

McClusky v. Gerhauser.

THOMAS MCCLUSKY, RESPONDENT, v. ADAM GERHAUSER, APPELLANT.

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The plaintiff in an action against the maker of a promissory note, may show that the note sued on is in the possession of defendant, although that fact is not alleged in the complaint.

If the plaintiff is the owner of a promissory note, he has a right of action notwithstanding the defendant may be in possession thereof.

The plaintiff's want of possession changes the character of the proof to be introduced, but not the character of the pleadings.

A party need not plead the loss of an instrument to be allowed to introduce secondary evidence of its contents. It is only necessary to prove such loss on trial.

The rule of pleading is different where a negotiable note properly indorsed is lost. There it has been held the owner of the lost note, must of necessity resort to a Court of Chancery, because an innocent party coming into possession of the note in regular course of business, would be in a condition to maintain an action at law, rather than the one who lost it. If resort is had to a Court of Chancery, the facts giving chancery jurisdiction must be stated.

When a note sued on is in possession of defendant, the remedy is at law.

Upon notice to defendant who is in possession of note sued on, to produce the same, and failure on his part, plaintiff may prove contents.

When a party applies for a new trial on the ground of surprise, he must show that he has evidence, which, if introduced on a second trial, will probably change the result; or at least has evidence tending to rebut the point made by the other side which he complains of as a matter of surprise.

A defective finding of facts is not a ground for reversing a judgment when that defect is not noticed or complained of in the Court below.

APPEAL from an order refusing a new trial in the District Court of the First Judicial District, Storey County, Hon. CALEB BURBANK presiding.

This was an action on a promissory note for \$1500 and for \$800 loaned without note. The note was alleged to have been executed in April, 1864, and the money loaned without note in May, 1864.

The answer denied the execution of the note and the borrowing of the money. On trial, it appeared that in January, 1864, plaintiff had loaned defendant \$5000, on mortgage. During that year, as appears by some evidence in the case, various payments had been made to plaintiff, and on receiving a payment from defendant, and a promise that another one should be made in a few days, plaintiff surrendered the \$1500 note.

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Subsequently the plaintiff foreclosed his \$5000 mortgage, and defendant obtained a credit on that mortgage for all the payments he had made, or at least all he could prove.

The plaintiff then brought suit on the \$1500 note, and the \$800 loaned on account. The plaintiff admitted that he had treated the payments made as credits on the note and the \$800, but after they were claimed and allowed as credits on the mortgage, he then sued for the full amount of the other claims. The defendant claimed on his motion for a new trial that he was taken by surprise when the plaintiff gave him notice to produce the note, and then proved the contents of a note said to have been delivered to him. That, from the proceedings, he supposed plaintiff had in his possession a note which he would attempt to show was executed by defendant. That the only issue he expected to meet was one as to the genuineness of the note.

The plaintiff's testimony showed the note was executed in the City of Virginia, *about* the 20th of April, 1864. The defendant, in his affidavits for new trial, showed that he left Virginia City early in the morning of the 20th of April, and did not return until after night.

Pitzer & Keyser, for Appellant.

A new trial should have been granted on the ground of surprise. From the form of the complaint, the defendant could not have anticipated the evidence which was introduced in regard to the note. On this point they cite the following authorities: *Graham and Waterman on New Trials*, 874, 876, 952, 962, 1002; 16 Cal. 87; 15 Cal. 502; 19 Cal. 36.

SECOND. The new trial should have been granted on the ground of newly discovered evidence.

That evidence was not discovered until after trial, and defendant being left in the dark as to the real issue, had no inducement before trial to look up such testimony.

The evidence is so material, that if heard it might probably produce a different result.

Gray vs. Harrison, Nevada Reports, 502.

The evidence is not cumulative. Lastly, we produce the affidavits of the intended witnesses as to what they can prove.

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The new trial should have been granted on the ground of insufficiency of evidence to support the verdict.

The Court erred in not finding that the judgment in the mortgage suit was a bar to this action.

The Court erred in allowing plaintiff to introduce testimony in regard to a note which plaintiff could not produce, and had not alleged in the complaint to be lost.

C. J. Lansing and Campbell & Seely filed a brief for Respondent, reviewing the testimony in the case.

Opinion by LEWIS, C. J., full Bench concurring.

The first question naturally presented upon the record in this cause arises upon the admission of evidence at the trial to prove that the note sued on was in the possession of the defendant at the time of the trial, the appellant claiming that, as there was no allegation of that fact in the complaint, no evidence could properly be introduced to establish it. In this he is clearly in error.

Such an allegation would have been entirely unnecessary. The gist of the action is the ownership of the note, and not its possession. Though it be in the defendant's possession, if the plaintiff be the owner, his right of action is as perfect as if it were in his own possession; and unless the defendant deny its execution it would be unnecessary to introduce it in evidence at the trial. If the right of action would be complete and perfect in the plaintiff, notwithstanding the note be in the possession of the defendant, we see no necessity for an allegation of that fact in the complaint. In pleading, it is only necessary to allege those facts which constitute the plaintiff's cause of action, or the defendant's ground of defense. In an action upon a promissory note, the fact that it is in the possession of the defendant is in no wise material to the plaintiff's right of recovery.

It merely changes the character of the evidence which he will have to produce to establish the execution of the instrument.

If it be in his own possession, the note itself is the best evidence, and he would be required to produce it; but if it be in the defendant's possession, and he fails to produce it, the plaintiff is permitted to prove its execution and contents by secondary evidence.

Upon the rule contended for by the appellant, secondary evidence

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of the contents of a written instrument could never be introduced, though the destruction of the original be proven, unless its destruction or loss be specially pleaded. We know of no rule which requires a party to plead a fact which, when established, has no effect whatever, except to admit secondary evidence to sustain his right of recovery or ground of defense. There is a material distinction between the case where the party suing had lost a negotiable promissory note before maturity, which was properly endorsed, and a case where it is in the possession of the maker, or the party against whom the suit is brought. When a note or bill payable to bearer, or properly endorsed, was lost before maturity, it was formerly held that the owner could not maintain his action upon it at all in a court of law, but was compelled to make application to the Courts of Equity for relief, for as a *bona fide* holder of such lost note taken in the ordinary course of trade would have a right of recovery on it, it would be impossible for him who had lost it to establish his right of recovery.

In equity, he who had lost a note might recover; but to entitle him to the aid of equity, it was necessary to set forth the loss of the note in his bill, because a Court of Equity will only lend its aid in those cases where there is not an adequate remedy at law. If the note were in the possession of the plaintiff, his remedy would be complete in a court of law. Hence the allegation of its loss, because necessary to bring the plaintiff within the pale of equity jurisdiction. But where the note was in the possession of the defendant, we apprehend it has never been held that the plaintiff was compelled to resort to equity for relief, or to allege the fact that the note was not in his own possession. We think it has always been held that this remedy is complete at law. (Chitty on Bills, 301.)

By the practice under the code, if the plaintiff wishes the note produced at the trial, the proper practice would be to notify the defendant to produce it; and if he fails or refuses to do so, secondary evidence of its execution may be introduced. (Section 394, Civil Practice Act.) There was no error, therefore, in admitting proof of the fact that the note was in the possession of the defendant.

The second point made by appellant is that the evidence thus introduced operated as a surprise upon him.

If, in fact, the note was not in his possession, he may well have complained of having been taken by surprise by the evidence of the plaintiff, for the general presumption is that the note sued on is in possession of him who brings the action upon it; and if the defendant had not convinced us by his own showing that a new trial would probably produce no different result, we would have no hesitation in saying that it should have been granted. But the evidence which the defendant presents to us, and which he claims might have been produced at the first trial had he supposed the plaintiff intended to prove that the note was in his (defendant's) possession, should not have the slightest weight in overcoming the case made out by the plaintiff, and we think could not possibly produce a different result in another trial. The case made out by the plaintiff was that, on or about the twentieth day of April, 1864, in the City of Virginia, the defendant executed and delivered the note in question to him. None of his witnesses swear positively as to the precise day of its execution and delivery. The proof which the defendant failed to produce at the trial, and which he offers to present if a new trial be granted, simply goes to prove that on the twentieth day of April, A.D. 1864, he was not in the City of Virginia. This is the only material fact sworn to by any of the witnesses whose affidavits were presented on the motion in the Court below.

That fact, if conclusively established, would not even tend to defeat the plaintiff's case, or to contradict the testimony of any of his witnesses.

It is just as probable, from the evidence of the plaintiff, that the note was executed and delivered on the nineteenth or twenty-first, as on the twentieth.

The proof, therefore, that the defendant was not at Virginia on the twentieth could have little or no weight in overcoming the case made out by the plaintiff. Had the precise day and place been positively fixed by him, evidence tending to show the defendant was not at that place upon the day fixed, would doubtless have some weight in overcoming the plaintiff's proof. But in this case no precise day is fixed. To set aside a judgment and order a new

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trial, when by his own showing the surprise of which the defendant complains resulted only in depriving him of the opportunity of introducing evidence which would be no defense to the plaintiff's right of recovery, or tend to disprove his case, would be clearly erroneous.

Usually when a judgment is set aside, or a new trial is granted, it is for the purpose of correcting some error or irregularity committed at the former trial, by which the rights of the party making the application were prejudiced, or to relieve him from an injury resulting from such surprise as could not have been guarded against by ordinary prudence. If it appears that a party has suffered no injury from the irregularity or surprise complained of, the Courts have uniformly refused to award a new trial. So it is also denied, when it is evident that a second trial will not or should not change the result. When, therefore, an application is made to set aside a judgment on the ground of surprise, and it appears from the applicant's own showing that if he had not been taken by surprise the result would not have been different; or at least, unless it appears that the result of a second trial will probably be different, a new trial should not be granted. (3 *Graham & Waterman on New Trials*, 968 and 969.)

It is also urged by the appellant that the judgment should be reversed because the Court below failed to find whether or not a certain judgment obtained by the plaintiff against the defendant in the month of January, A.D. 1865, constituted a bar to the present action. The record does not show that this fact was called to the attention of the Court below, or that any exception was taken to that failure on the part of the Court.

When an exception is not taken in such case, the judgment will not be revised. Section 2, p. 394, Statutes of 1864-5, explicitly provides that "in cases tried by the Court without a jury no judgment shall be reversed for the want of a finding of the facts, unless exceptions be made in the Court below to the finding or to the want of finding." Upon this point, therefore, we cannot reverse the judgment.

As to the newly-discovered evidence, we have already shown that it is not of that character which would be likely to change the result of the first trial.

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And unless it be probable that the newly-discovered evidence will produce a different result, a new trial should not be granted. (3 Graham & Waterman on New Trials, 1043.)

The judgment of the Court below must therefore be affirmed, and it is so ordered.

T. M. NOSLER, APPELLANT, v. M. P. HAYNES ET AL.,
RESPONDENTS.

G. advanced money to a mortgagor to take up a mortgage. The money was paid to the mortgagee, and some days thereafter he assigned the mortgage to the party who advanced the money. *Held*, that if this assignment was made in pursuance of a contract between G. and the mortgagor, it was a valid security for the money advanced. But if the assignment was made after the money had been paid to the mortgagee, and not in pursuance of a previous contract, the mortgage was extinguished and afforded no security to G.

This Court cannot reverse a judgment unless it affirmatively appear that error has been committed.

APPEAL from an order of the District Court of the Second Judicial District, Hon. S. H. WRIGHT presiding.

The facts are stated in the opinion.

Will Campbell, for Appellant.

Robert M. Clarke, for Respondents.

The judgment is in accordance with the stipulation of the parties, and under that stipulation there can be no decree for sale of mortgaged premises.

Opinion by LEWIS, C. J., BEATTY, J., concurring.

This action was brought to foreclose a certain mortgage executed by the defendants to one F. A. Tritle, on the 23d day of August, A.D. 1862, and afterwards assigned and transferred to the plaintiff, who now claims to be the owner thereof. The complaint contains the usual allegations in actions of the kind—the execution and delivery of the note and mortgage; the assignment to the plaintiff, and the failure on the part of the defendants to discharge the debt. The

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defendants admit the execution and delivery of the note and mortgage, but as a defense to the plaintiff's right of foreclosure, they rely on the following facts, which are presented to us in the findings of the Court below :

On the 2d day of July, A.D. 1863, which was long after the note and mortgage, here sued on, became due, one Abner Gentry loaned the defendant, Moses P. Haynes, the sum of five hundred and fifty dollars, for the purpose of paying and discharging the same ; that two days thereafter the note and mortgage were assigned and transferred to Gentry by the attorney in fact of the mortgage ; and were subsequently assigned by Gentry to the plaintiff Nosler, who now claims that he is entitled to recover the sum of fourteen hundred and twenty-five dollars, the amount due thereon.

The following stipulation entered into by the counsel of the respective parties to this action, on the 2d day of May, A.D. 1865, appears in the record :

“ It is hereby stipulated and agreed, by and between the parties in the above cause, that the judgment herein to be rendered shall be rendered and entered for the sum of five hundred and fifty dollars, in gold coin of the United States, bearing interest on said sum at the rate of ten per cent. per annum, and costs of suit.”

Judgment was rendered, in accordance with this stipulation, in favor of the plaintiff, for the sum of five hundred and fifty dollars, but the Court below refused to order a sale of the mortgaged premises to satisfy such judgment. From the refusal of the Court to make such order, the plaintiff appeals. The record does not contain the evidence adduced at the trial, and from the meagre synopsis of the facts presented to us by the transcript, we find it impossible to determine whether it was the understanding between Haynes and Gentry that the mortgage should be assigned by Tritle to Gentry as security for the five hundred and fifty dollars loaned, or whether Gentry made the loan to Haynes with no such understanding or agreement, and the note and mortgage were subsequently assigned by the attorney of Tritle without authority from Haynes to do so. If Gentry loaned the money to Haynes for the purpose of enabling him to pay off and discharge the note and mortgage, and with no understanding that they should be transferred to him as security for his loan, the payment of the money to Tritle would extinguish the

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note and mortgage, if they were in his possession, as it is admitted they were, and a subsequent assignment of them to Gentry, after maturity, and without the consent of Haynes, would give the assignee no right of action whatever, for he would take them subject to all the equities existing between the defendants and Tritle at the time of the assignment.

In this case, therefore, assuming the facts to be that the money was loaned to Haynes for the purpose of discharging the mortgage, and that there was no agreement on his part that it should be assigned to Gentry to secure his loan, the payment of the money to Tritle extinguished the mortgage, and the Court ruled correctly in refusing to order the premises sold to satisfy the claim of plaintiff. If, however, there was an agreement between Haynes and Gentry, at the time the loan was made, that the Tritle mortgage should be assigned to Gentry as security for his loan, the assignment was properly made, and he, or his assignee, would have the right to have the mortgaged premises sold to satisfy his claim against Haynes.

Whether any such agreement or undertaking, in fact, existed, it is impossible to determine from the record presented to us. The Court finds:

“That on the 2d day of July, 1863, Abner Gentry loaned to the defendant Haynes the sum of five hundred and fifty dollars, for the purpose of liquidating and extinguishing the note and mortgage held by Tritle; and that subsequently, and long after their maturity, Gentry obtained an assignment of them to secure the repayment of the money loaned by him to Haynes.”

From this finding, it would appear that the note and mortgage were not assigned to Gentry until after they had been discharged and paid by Haynes; the record, therefore, as it is presented to us, shows no error on the part of the Court below in refusing to order the mortgaged premises sold to satisfy the plaintiff's claim; hence, it becomes our duty to affirm the judgment, for the presumption is always in favor of the regularity of the proceedings of Courts of Record. To entitle him to a reversal of the judgment, the appellant should always affirmatively show error. (*Rabe v. Wells*, 3 Cal. 151.) This has not been done.

The judgment must be affirmed.

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defendants admit the execution and delivery of the note and mortgage, but as a defense to the plaintiff's right of foreclosure, they rely on the following facts, which are presented to us in the findings of the Court below :

On the 2d day of July, A.D. 1863, which was long after the note and mortgage, here sued on, became due, one Abner Gentry loaned the defendant, Moses P. Haynes, the sum of five hundred and fifty dollars, for the purpose of paying and discharging the same ; that two days thereafter the note and mortgage were assigned and transferred to Gentry by the attorney in fact of the mortgage ; and were subsequently assigned by Gentry to the plaintiff Nosler, who now claims that he is entitled to recover the sum of fourteen hundred and twenty-five dollars, the amount due thereon.

The following stipulation entered into by the counsel of the respective parties to this action, on the 2d day of May, A.D. 1865, appears in the record :

“ It is hereby stipulated and agreed, by and between the parties in the above cause, that the judgment herein to be rendered shall be rendered and entered for the sum of five hundred and fifty dollars, in gold coin of the United States, bearing interest on said sum at the rate of ten per cent. per annum, and costs of suit.”

Judgment was rendered, in accordance with this stipulation, in favor of the plaintiff, for the sum of five hundred and fifty dollars, but the Court below refused to order a sale of the mortgaged premises to satisfy such judgment. From the refusal of the Court to make such order, the plaintiff appeals. The record does not contain the evidence adduced at the trial, and from the meagre synopsis of the facts presented to us by the transcript, we find it impossible to determine whether it was the understanding between Haynes and Gentry that the mortgage should be assigned by Tritle to Gentry as security for the five hundred and fifty dollars loaned, or whether Gentry made the loan to Haynes with no such understanding or agreement, and the note and mortgage were subsequently assigned by the attorney of Tritle without authority from Haynes to do so. If Gentry loaned the money to Haynes for the purpose of enabling him to pay off and discharge the note and mortgage, and with no understanding that they should be transferred to him as security for his loan, the payment of the money to Tritle would extinguish the

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note and mortgage, if they were in his possession, as it is admitted they were, and a subsequent assignment of them to Gentry, after maturity, and without the consent of Haynes, would give the assignee no right of action whatever, for he would take them subject to all the equities existing between the defendants and Tritle at the time of the assignment.

In this case, therefore, assuming the facts to be that the money was loaned to Haynes for the purpose of discharging the mortgage, and that there was no agreement on his part that it should be assigned to Gentry to secure his loan, the payment of the money to Tritle extinguished the mortgage, and the Court ruled correctly in refusing to order the premises sold to satisfy the claim of plaintiff. If, however, there was an agreement between Haynes and Gentry, at the time the loan was made, that the Tritle mortgage should be assigned to Gentry as security for his loan, the assignment was properly made, and he, or his assignee, would have the right to have the mortgaged premises sold to satisfy his claim against Haynes.

Whether any such agreement or undertaking, in fact, existed, it is impossible to determine from the record presented to us. The Court finds:

“That on the 2d day of July, 1863, Abner Gentry loaned to the defendant Haynes the sum of five hundred and fifty dollars, for the purpose of liquidating and extinguishing the note and mortgage held by Tritle; and that subsequently, and long after their maturity, Gentry obtained an assignment of them to secure the repayment of the money loaned by him to Haynes.”

From this finding, it would appear that the note and mortgage were not assigned to Gentry until after they had been discharged and paid by Haynes; the record, therefore, as it is presented to us, shows no error on the part of the Court below in refusing to order the mortgaged premises sold to satisfy the plaintiff's claim; hence, it becomes our duty to affirm the judgment, for the presumption is always in favor of the regularity of the proceedings of Courts of Record. To entitle him to a reversal of the judgment, the appellant should always affirmatively show error. (*Rabe v. Wells*, 3 Cal. 151.) This has not been done.

The judgment must be affirmed.

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OPINION UPON RE-HEARING.

Per LEWIS, C. J.—The answer *admits* the assignment of the mortgage to Gentry as security for the money advanced. This admission must prevail over the findings of the Court to the contrary.

A stipulation as to *amount* of judgment does not preclude the Court from entering the necessary decree to enforce the payment by sale of mortgaged property.

Per BEATTY, J.—The complaint avers the mortgage was *not* paid, and that it was regularly assigned. The answer denies neither of these allegations, and sets up no legal defense. On such pleadings, the plaintiff is entitled to his decree, although it seems from the facts found, the defendant had a perfect defense against the mortgage claim, which, however, he utterly failed to set up.

Although defendant had a good defense to this action, he owed the same amount of money which could have been recovered in another form of action. Having failed to make the proper defense, there is no hardship in compelling him to pay the money which he owes.

Opinion by LEWIS, C. J.

In our former opinion in this case we affirmed the judgment of the Court below, because we discovered no evidence in the record to show that there was any agreement or understanding between Haynes and Gentry that the mortgage held by Tritle should be assigned as security for the money loaned by Gentry to discharge it, and upon the finding by the Court, from which it was inferrable that there was no such agreement. But upon the re-hearing, our attention is called to the fact that the defendant, by his answer, admits that the mortgage was in fact assigned to Gentry, the plaintiff's assignor, for the purpose of securing to him the repayment of the money loaned by him. This fact escaped our attention upon the original examination of the case, but since our attention is called to it, we observe that the admission of the assignment is full and complete, and therefore the plaintiff is entitled to a sale of the mortgaged premises to satisfy his judgment. The stipulation between the parties that judgment might be entered for a certain sum of money is no waiver of the right to foreclose the mortgage. The stipulation, as we look upon it, is merely a settlement of the amount which was legally due the plaintiff, and not a waiver of his right to a decree of foreclosure. Neither would the finding of fact by the Court below prevail against the admission of the answer. The findings of fact are subordinate to the admissions of the parties litigant

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in their pleadings. The Court below will therefore order a sale of the mortgaged premises, to satisfy the judgment rendered in favor of the plaintiff.

Opinion by BEATTY, J.

I concur in the present opinion, because the complaint alleges that the note and mortgage were not paid when the suit was brought, and that nothing had been paid thereon, except the certain sums credited on the back of the note. It also alleges a regular assignment of the note and mortgage to plaintiff.

The answer admits the execution and assignment of note and mortgage, and does not allege that the note was paid or discharged before assignment. The answer does not pretend to set up any defense to the entire note, but simply attempts to show that the judgment should not exceed \$550. Defendants have no right to complain that judgment has gone against them and their property for that which they, at least, indirectly admit to be due and a lien on the premises mortgaged. At the same time, it would appear from the findings of facts that the defendants had a good legal defense to the entire note and mortgage, if it had been properly set up. If the facts are as they seem to be shown by the findings, plaintiff's assignor had a good cause of action for money loaned to defendants, but none on the note and mortgage. No injustice or wrong, however, is done the defendants by ordering the sale of the property. They are only made to pay what they owe. There is certainly no moral wrong done in making the property responsible under the peculiar circumstances of this case. The money was advanced without interest to remove a much heavier and more burdensome incumbrance from the property.

If there was any legal objection to this sale, the defendant has failed to set it up, and cannot complain.

Lambert v. McFarland.

W. H. LAMBERT, RESPONDENT, v. W. D. MCFARLAND
ET AL., APPELLANTS.

In an action of replevin, the judgment must be for the return of the property and an alternative judgment for its value if not returned. An absolute judgment for its value, not allowing defendant to satisfy the judgment by return of the property with costs and damages, is erroneous.

APPEAL from a judgment rendered by the District Court of the Second Judicial District, Hon. S. H. WRIGHT presiding.

Wallace & Flack and *A. C. Ellis*, for Appellants.

W. C. Wallace, for appellants, made the points that the judgment was not in conformity to the relief sought in the complaint, to wit: the return of the property and damages for the taking and detention. And also that a number of the instructions given were erroneous. The instructions were not passed on by the Court, and are therefore not noticed more fully here.

Wm. Patterson and *P. H. Clayton*, for Respondent.

Opinion by LEWIS, C. J., BEATTY, J., concurring.

Replevin to recover one hundred and twenty-eight head of cattle, particularly described in the complaint, together with the sum of one thousand dollars damages, which the plaintiff alleges he suffered by the wrongful taking and withholding of his cattle by the defendants. The record shows that the cattle were not delivered to the plaintiff by the Sheriff, but continued in the possession of the defendants, and were under his control at the time of the trial.

The jury found the following verdict in favor of the plaintiff: "We the jury in the above entitled case find a verdict for the plaintiff, and assess the damages at thirty-one hundred and thirty dollars," upon which the Court ordered judgment to be entered in accordance therewith.

Defendants appeal. The verdict and judgment are clearly erroneous, and must be reversed. In an action of replevin, or for the claim and delivery of personal property, under the modern

practice, if the property be in the possession of the defendant, the value of the property must always be found in the verdict, and the judgment must be in the alternative that the plaintiff recover the property sued for, or in case delivery cannot be had, then for its value.

It is not optional with the plaintiff in such case to take judgment for the value of the property absolutely.

The primary object of this action is the recovery of the property, and judgment for its value in damages is only authorized when a delivery of the property itself cannot be had. Though the phraseology of Section 200 of the Practice Act, prescribing the form of the judgment in these cases, is somewhat ambiguous and its purpose uncertain, subdivision four of Section 210, respecting the execution, removes all uncertainty as to the form of the judgment. It provides that "if it (the execution) be for the delivery of the possession of real or personal property, it shall require the Sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the Sheriff to satisfy any costs, damages, rents or profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered to be specified therein, *if a delivery thereof cannot be had.*"

An execution in the alternative, as prescribed by this section, could not be issued upon any absolute judgment for a certain sum of money. It is quite evident, therefore, that it was the intention that the judgment should be in the alternative, that is for the return of the property, or if return thereof cannot be had, then for the value. But as this precise question has been fully considered and determined by the Court of Appeals of the State of New York, in the case of *Fitzhugh vs. Wiman*, 9 Sheldon, 559, we deem it unnecessary to give it any further consideration. In that case, the Court held upon provisions of the code which are in the exact language of the sections of our Practice Act above referred to: "That in this species of actions, judgment for the value of the property can only be taken in connection with a judgment for the recovery of the possession as an alternative, depending upon the ability of

SUPREME COURT OF NEVADA, 1866.

Rhodes v. O'Farrell.

the Sheriff to find and deliver the property itself upon the execution."

The verdict and judgment in this case were therefore erroneous, and must be reversed.

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W. H. RHODES, RESPONDENT, v. J. F. O'FARRELL, APPELLANT.

A judgment which is personal against the tax-payer, and *in rem* against real estate, is a debt within the purview of the Act of Congress, which makes certain United States notes a legal tender for debts.

A debt is a legal obligation or liability to pay a sum certain, and may arise from contract as from some liability imposed by law, and not arising out of contract in its more limited sense. Per BEATTY, J.

If a more extended definition is given to the term contract so as to include all judgments within that term, then it must also include the liability to pay taxes. Per BEATTY, J.

All judgments for money, and all taxes payable in money, and for which an action might be brought against the delinquent, are debts. Per BEATTY, J.

The State may impose taxes payable in gold, where no debt is created.

She may impose stamp duties and not part with the stamps until the purchaser pays gold for them. She may require license to be taken out and not issue such license until it is paid for in gold. But all judgments in favor of the State are debts, and may be paid in paper. BEATTY, J.

Taxes are not debts within the purview of the Act of Congress referred to. Per BROSNAN, J.

But if the State goes into Court and obtains a judgment for these taxes against the person of the tax-payer, this personal judgment becomes a debt, and like other debts may be discharged in paper. Per BROSNAN, J.

APPEAL from the District Court, First Judicial District, Hon.

R. S. MESICK presiding.

The facts are stated in the Opinion.

D. Corson, for Appellant.

W. H. Rhodes, for Respondent.

Opinion by BEATTY, J.

In this case a judgment was obtained against Rhodes and his interest in a certain piece of real estate for some two hundred and

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forty-eight dollars, sixty-six cents, due for taxes on said real estate for the year 1865. Rhodes tendered to the defendant, who is Tax Collector for Storey County, the amount of the judgment and costs in United States legal tender notes. Defendant refused to accept them, the judgment rendered being in form for gold coin.

Thereupon Rhodes filed his bill to stay the sale under execution, and compel the defendant to accept the legal tender notes. The Court below ordered the defendant to accept the notes and satisfy the judgment. Defendant appeals to this Court.

The only serious question for this Court to determine is whether a judgment for taxes which is both a personal judgment against the tax-payer, and in the nature of a judgment *in rem* against his real estate, is a debt within the purview of the Act of Congress which declares such notes shall be a legal tender for all debts public and private.

In the case of *Perry v. Washburne*, (20 Cal. 318) the counsel for respondent cites various authorities (see page 333) to show that taxes are not debts.

A portion of these authorities are not within our reach, but I have examined all to be found in the State Library, and none of them either establish, or in my judgment, tend to establish such a proposition.

Chief Justice FIELD, in delivering the opinion of the Court in the same case, says: "Taxes are not debts within the meaning of the Act of Congress which declares that Government notes shall be a legal tender for all debts, public and private."

He then asserts that a debt is a sum of money due by contract express or implied, and argues taxes are not due by contract. If his premises were correct I should not be disposed to question his deduction.

But I am clearly of the opinion debts are not confined to obligations for the payment of money arising on contract. As I understand the term debt, it means an obligation or legal liability to pay a sum certain, and it makes no difference how that liability arises, whether it be by contract or is imposed by law without contract. Whether such an obligation or liability should be evidenced by a promissory note, or a judgment rendered for trespass or slander, whenever it becomes a legal liability for a definite sum of money

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due from one person, corporation or government, to another, it is technically a debt. Some authors have held that all judgments (even a judgment for slander) are contracts, because the law presumes an implied promise on the part of those against whom the judgment is rendered to pay the same. Others in defining contracts confine the term to those obligations and promises which are the result of mutual and voluntary agreement, and do not include judgments within the class of contracts.

But settle this proposition as you may, it does not change this case. If the word contract is to have such an extensive signification as to include all judgments it would certainly include taxes, for it would certainly be as reasonable to suppose the law raises an implied promise on the part of a tax-payer that he will pay what is due to the State, as that he will pay a judgment which was rendered against him for slander, trespass, or any other *tort*. If, however, we give a more limited and restricted meaning to the term contract, then there are many debts which are not the result of contracts.

All judgments for *money* are debts under any definition of that word given in the books, and the writer of this opinion thinks all taxes which are payable in money, become fixed in amount, and may be the foundation of a personal action against the tax-payers, are debts, and as such may be discharged by the tender of the United States legal tender notes.

That the State may impose taxes that could not be paid in United States notes, I do not question. She may impose stamp duties and sell the stamps only for gold. In such case, if the stamps are not delivered until the gold is paid, there is no debt. So the State may impose licenses on certain business, and require all persons before following such business to pay a license in gold. If the license is not issued until the gold is paid, there is no debt. The State, like all individuals, is bound to take paper for a *debt*. But an individual is not bound to sell any commodity for paper. A flour merchant may refuse to sell his flour for paper or for gold. He may refuse to part with his flour unless he gets horses or cows in exchange. If no credit is given, he will have no difficulty in carrying out his intention. But if it ever becomes necessary to enforce a liability

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by a money judgment against the delinquent, that judgment becomes a debt and may be paid in paper.

Respondent ought not to be restrained from selling unless the tender is kept good.

As it does not appear from the transcript whether that has been done or not, the Court will retain this case until that is ascertained. Upon the respondent producing satisfactory evidence, either by receipt of appellant, or by the certificate of the Clerk, that he has either paid the money tendered to the appellant, or that he has deposited it in Court subject to the disposal of the appellant, the judgment of the Court below will be affirmed, with costs.

Opinion by BROSNAN, J.

From so much of the opinion of my brother BEATTY as holds, or in the slightest degree intimates, that *taxes* are *debts* within the purview of the Act of Congress declaring notes to be a legal tender for all debts public and private, I most respectfully dissent. A tax fails to possess any of the characteristics of a debt, as that term is usually understood when used in statutes, or even in its more enlarged acceptance in law generally.

It is not incurred or created with the consent of the tax-payer. Indeed it is often imposed upon him *in invitum*. Nay, more, it is sometimes imposed upon him by the votes of majorities, themselves not tax-payers, and that too for objects to which the tax-payer may be opposed.

A tax is not the subject of attachment or set-off as an ordinary debt. It is a duty, a pecuniary charge imposed by Government for public purposes, whether the subject is willing or not. He has no option to decline the burden. Its existence depends upon legislative power and action, and is obligatory without the assent of the individual. I submit that I am supported by the authorities in this view. It was so decided by the Supreme Court of California. (20 Cal. 318.) (See also, to the same point, 3 Metc. 520; 11 Metc. 135; 5 Gray, 533.)

The case in 3 Metcalf was this: A schoolmaster had a claim against the City of Boston, which he assigned. The assignee brought suit, and the defendant attempted to set off a tax which had been assessed upon him. The set-off was not allowed, on the

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ground that the tax was not a debt due by contract nor by judgment. This was recognized as good law in the case. (11 Metc. 135, *supra*.)

The case above cited, from the same State, (5 Gray, 533) was this: A citizen was arrested and imprisoned for non-payment of taxes, after the passage of an Act abolishing imprisonment for debt. A *habeas corpus* was issued to obtain his release, upon the ground that the tax was a debt, and that the prisoner was entitled to the benefit of the Act. But the Court held that the Act did not compass taxes, they not being debts, and the prisoner was remanded to custody. I am therefore deliberately of the opinion that the Act of Congress declaring that all debts, public and private, (except, &c., &c.) may be discharged by legal tender notes, has not the most remote reference or application to taxes levied under State laws for State purposes. So believing, I conclude that taxes, as well as stamp duties, and charges for licenses to transact business, may be collected in coin, notwithstanding the present legislation of Congress, if the legislative department of the State government see proper so to collect them.

The case under consideration, however, is embarrassed by the conceded fact that a judgment has been recovered in a Court of law against the respondent, the tax-payer.

According to my understanding, this entirely changes the character of the demand. A judgment *in personam* is a debt, and being such, is embraced within, and affected by the Act of Congress.

If the State will disrobe herself of sovereignty, and enter the forensic arena with her subject, to collect a paltry tax of one dollar by the ordinary process of a suit at law, and at a cost to the delinquent tax-payer of from twenty to thirty dollars, which is of no benefit to the State, as is now the patent fact; and if in doing this the State recovers judgment, I can perceive no satisfactory reason why such a judgment may not be satisfied by payment of the amount in legal tender notes of the United States.

Upon this ground alone, that such judgment is a debt, I concur in the opinion affirming the judgment of the District Court.

Brumfield v. The Board of Commissioners of Douglas County.

W. H. BRUMFIELD, PETITIONER, v. THE BOARD OF COMMISSIONERS OF DOUGLAS COUNTY, RESPONDENT.

The Act creating a sinking fund for Douglas County, and regulating the mode of advertisement for and receipt of bids "until the next regular meeting of the Board of County Commissioners of said county thereafter," does not authorize the receipt or consideration of a bid filed with the Treasurer on the day of the next regular meeting, but at a time subsequent to the meeting and adjournment for that day.

The Board of County Commissioners is not a Court, as Courts are defined in the Constitution. And such bodies may lawfully meet and transact business on the first day of January.

CERTIORARI to the Board of County Commissioners of Douglas County.

The facts are stated in the Opinion.

W. H. Brumfield, for Petitioner.

Atwater and *A. T. Hawley*, District Attorneys of Douglas County, for Respondents.

Opinion by BEATTY, J., full Bench concurring.

This was a proceeding by *certiorari*, to review certain proceedings of the Board of Commissioners of Douglas County.

The facts of the case are as follows: On the 23d of February, 1865, an Act of the Legislature was approved creating a sinking fund for Douglas County, and providing that when there is money in that fund the Treasurer shall advertise for bids by parties holding the indebtedness of the county, proposing to exchange that indebtedness for the money on hand—those who will surrender claims on terms most favorable to the county to have the money in the fund.

The Act provides that the Treasurer shall advertise for sealed proposals, to be received by him "until the next regular meeting of the Board of County Commissioners of said county thereafter."

On the first day of the next regular meeting the Board of Commissioners, together with the Auditor and Treasurer, to examine the bids and distribute the funds to those entitled.

Prior to the first day of January, 1866, the Treasurer of the county did advertise for bids, and in the latter part of December a

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number of bids were regularly delivered to him, and filed in his office. Among others, were several bids made by the petitioner in this case.

The Commissioners met on the first Monday of January, as the law requires. But that being the first day of January, and a holiday, they adjourned over to the second, without doing any business on the first. After the Board adjourned on the first, the Treasurer received from the Post Office an additional bid for the surrender of county indebtedness. When the Board met on the second of January, the question arose whether they could consider that bid which was received by the Treasurer on the first, after their adjournment, or whether they must confine themselves to the bids made before their meeting on the first. They first determined to reject the bid received on the first, but afterwards reconsidered this vote, and did consider this last bid, awarded a part of the money to the last bidder, and thereby deprived the petitioner of some \$800 which he would have received had this latter bid not been considered. Thereupon the petitioner obtained a writ from this Court directed to the Commissioners, requiring them to show by what authority they took into consideration a bid made after the meeting of the Board. The language of the statute is, that the advertisement shall be for sealed proposals until the next regular meeting of the Board. We do not think it was intended that the Board should act on any bids except those made in response to the advertisement. Bids received until the next regular meeting could not include those bids received after such meeting.

If the Board could act on bids made after their meeting, it would defeat the objects of the law in requiring the proposals to be sealed when made.

But it is claimed that Monday, being a non-judicial day, the Board was not regularly in session that day, and that the second of January was the first day of their regular and lawful meeting for that month. An Act of the Territorial Legislature, still in force, provides, "No Court shall be opened, nor shall any judicial business be transacted, on Sundays or New Year's Day, &c."

If this Board is a Court, then it could not lawfully meet for the transaction of business on the first day of January.

Considering it a Court, either the meeting on the second was the

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first regular day of meeting, or else there was no lawful term that month. But we are of opinion the law last referred to does not have any application to the Board of Commissioners. We do not hold that such Board is a Court. The Constitution says the judicial power of the State shall be vested in a Supreme Court, District Courts, Justices' Courts, and that the Legislature may establish courts for municipal purposes only. This body, then, is not a Court, as defined by the Constitution. We do not think their meeting on the first of January should be held a nullity. If we are correct in these views, the Court had no authority to consider or act on bids received by the Treasurer after the adjournment of the Board on Monday, the first of January.

It is therefore ordered and adjudged that the action of the Board in considering bids filed with the Treasurer after the adjournment on the first of January was void and without authority, and the Board are commanded to set aside all orders and proceedings made in relation thereto, and to refrain from making any order for the payment of money on such bid or bids.

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J. S. DILLEY, APPELLANT, *vs.* CHARLES L. SHERMAN,
RESPONDENT.

Where an action is brought to recover a water right, and *mill site* described by metes and bounds, as land boundaries are usually described, *held* that an instruction to the effect "that the plaintiff, in order to recover, must prove that he was entitled to the premises and water, and that defendants damaged him by the diversion of the water," is erroneous. To entitle plaintiff to recover, it was only necessary to prove title and immediate right of possession in himself, and the occupancy by defendants of the premises described when suit was brought.

APPEAL from a judgment of the District Court of the Third Judicial District, the Hon. WM. HAYDON presiding.

The declaration in this case alleges that plaintiff is, and for a long time has been, the owner of, and in possession of, a certain water right and *mill site*, situate in Gold Cañon, Silver City, and bounded as follows: Here follows description of corners, lands, courses, distances, etc., embracing a small tract of land over which

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a small mountain stream flows. Then follows an averment of ouster and damages, and a prayer for restitution of the premises and damages, etc. Defendant denies all the material allegations of the complaint, and avers prior appropriation of the waters of the creek, etc. The parties went to trial, and many instructions were asked on each side, and many exceptions were taken to the Judge's rulings.

The jury found a verdict for defendant. The plaintiff moved for a new trial, and upon that motion being overruled, appealed to the Court both from the order overruling the motion for a new trial, and from the judgment. There was a statement on motion for new trial, and also a statement and counter statement on appeal. These statements from not being properly engrossed are confused and unintelligible to some extent. This Court was therefore unable to properly investigate many of the points presented.

F. H. Kennedy and *R. M. Clarke* appeared for Appellant.

H. M. Steel, for Respondent.

Opinion by LEWIS, C. J., BROSNAN, J., concurring.

As the appellant's statement and respondent's counter-statement on appeal in this case came before us, without being engrossed, we are unable to determine the merits of the plaintiff's claim; neither can we determine whether the verdict of the jury is sustained by the evidence. But, upon the following instruction, which appears from the record to have been given by the Court below, the judgment must be reversed: "The jury are instructed that the plaintiff, in order to recover in this action, must prove that he was entitled to the premises and waters, and that the defendant damaged him by the diversion of said water from his premises."

That, to entitle the plaintiff to recover in an action of ejectment, he must show that he is entitled to the possession of the premises, there can be no doubt; but that he is not required to show that he is also entitled to the enjoyment of any stream of water which may run through it; or that he was damaged by the diversion of it by the defendant, is equally clear.

The primary object of the action of ejectment is the recovery of

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the possession of real property ; and originally, only nominal damages were ever recoverable in it. The real damage was recoverable only in an action for mesne profits (1 Chitty on Pleading, 192) ; and it has never been held necessary, in an action of ejectment, for the plaintiff to prove that he has suffered actual damage by the ouster of the defendant.

At Common Law, when the title of the real plaintiff was controverted, it was only necessary to prove : 1. That he had the legal title to the premises at the time of the demise laid in the declaration. 2. That he also had the right of entry. 3. That the defendant, or those claiming under him, were in possession of the premises at the time when the declaration was served. (2 Greenleaf on Evidence, § 303.) Notwithstanding, section 64 of our Practice Act authorizes the recovery of mesne profits, and damages for waste committed on the premises in the action of ejectment ; yet it by no means makes it necessary for the plaintiff to prove damages to entitle him to recover the possession of the premises. Under the present practice, if the plaintiff proves the right of possession in himself, and the withholding of the premises by the defendant at the time the action is instituted, it is sufficient to entitle him to a recovery. (*Payne & Dewey v. Treadwell*, 16 Cal. 220.)

It was stated by counsel, upon the argument of this case, that some of the instructions which appear in the record of this case belong to another case between the same parties, and that they were not given by the Court below in this case. This may be so, but no steps have been taken to correct the record, and we cannot look beyond it for facts upon which to determine this appeal. We find other erroneous instructions in the Transcript, which counsel for defendant asked to be given to the jury, but whether they were so given or not, does not appear from the record ; we must therefore presume they were not, in obedience to the rule that all presumptions are in favor of the regularity of the proceedings of Courts of Record.

The judgment of the Court below must be reversed, and a new trial ordered.

Low v. Blackburn.

C. A. LOW, APPELLANT, vs. S. A. BLACKBURN, RESPONDENT.

An agreement between some of the parties to a suit in equity cannot be the foundation for a decree, when there is nothing in the pleadings on which to base such decree.

When there was litigation between Low, on one side, and a widow and her infant daughter on the other, as to the ownership of certain property, and it was agreed to compromise the litigation by first perfecting the title in Low, upon which he was to convey a part of the property to the widow. This will not authorize a decree declaring the widow has no title, and then requiring Low to convey, as per terms of compromise. Such a decree does not dispose of the infant's claim.

Low would not be bound to convey whilst the claim of the infant remains unadjusted, nor until after his title was perfected.

APPEAL from a decree rendered in the District Court of the First Judicial District, the Hon. CALEB BURBANK presiding.

Williams & Bixler appeared for Appellant.

L. Aldrich, for Respondent.

Opinion by BROSNAN, J.

This is a suit in equity instituted to quiet the title to a certain interest (viz: one-tenth) in mining ground known as the "Crown Point Claim." The material facts and allegations in the complaint, so far as necessary to a full understanding of the case, are substantially these: That at the commencement of the action, and for years anterior, the appellant, Low, was the lawful owner and in the possession of the property in controversy; that his title is founded upon a valid deed of conveyance executed by one Blackburn in 1860, whereby and through mesne conveyance the estate (said one-tenth) vested in him, Low; that the defendant, Sarah A. Blackburn, is the widow of said Blackburn, and the defendant, Minnie Blackburn, is the daughter of the said Sarah and of the deceased John L. Blackburn, and an infant; and that the defendant Small is her duly appointed guardian; that the defendants unlawfully claim some interest or estate in said property (the guardian claiming on behalf of his ward) which claim beclouds and depreciates the value of said property.

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The complaint prays that Low be adjudged the only lawful owner, and that his title be quieted, and the defendants be barred and enjoined from further asserting any interest in or claim to any portion of said undivided one-tenth of said mining ground.

The answer, which is joint, simply "denies each and every allegation contained" in the complaint.

The case was tried by the Court without the intervention of a jury, and no portion of the evidence is embodied in the record. We have, therefore, to determine the case upon the pleadings and findings of the District Court as they appear before us. The Court finds, in the first instance, as follows :

"That the plaintiff was, at the commencement of this action, and prior thereto, had been, and still is, the owner of the premises described in the complaint, and derails title thereto from John L. Blackburn, who died in the latter part of the year 1861."

The Court also finds that the plaintiff was in possession of the property described in the complaint at the time the action was commenced. The Court further finds, "that at and before the commencement of this action, the said defendants, Sarah A. Blackburn and B. F. Small, not being in possession, were asserting title to the premises aforesaid, adversely to the plaintiff, and under and by virtue of the title of John L. Blackburn, deceased, which is in the plaintiff," the said Sarah claiming for herself as widow, and the said Small claiming as guardian for his ward.

Had the case rested at this point, as we think it should have, so far as we are advised by the record, there would seem no impediment to a decree in favor of the plaintiff, Low, the appellant in this Court. Clearly, the facts thus far found, not only authorized, but demanded such a result. All the important allegations in the bill of complaint were proven and established according to the findings of the District Court, and as a legal as well as a logical sequence, (if the complaint stated a sufficient cause of action, as to which no question is made) the plaintiff was entitled to the usual decree.

He is declared to be the owner and in possession of the premises, and that the defendants—Sarah in her own right as widow, and Small, the only person who could assert the claim as the guardian of the infant—were claiming adversely to him. But the embarrassment of this case, if there were any, seems to arise from the intro-

duction on the trial of certain documentary evidence, the use or admissibility of which this Court cannot understand from the record.

In the sixth finding of the District Court it is stated, that at the time of the commencement of this action, several suits were pending between the defendant in this suit, Sarah A. Blackburn, and others, concerning the premises in dispute and certain interests in the Yellow Jacket mine ; and that, for the purpose of adjusting and settling all the matters in controversy, the attorneys of the respective parties litigant (the defendant, Sarah A. Blackburn, assenting) entered into a written stipulation, the substance of which, for the sake of brevity, we state only so far as it affects the case under consideration. In that document it was agreed, that as to the title of John L. Blackburn to the undivided one-tenth part of the "Crown Point claim," (the property involved in this case) it should be perfected in Charles L. Low by sale, judgment, or otherwise, as the attorneys of the respective parties litigant may deem proper ; and, therefore, that said Low should convey ten feet of said ground in the "Crown Point claim," free of incumbrances, to the defendant, Sarah A. Blackburn.

The Court below next finds that the defendant, Sarah A. Blackburn, ratified and adopted this stipulation, and that this suit was brought with her consent, upon the recommendation of the attorneys of both parties, as being the best means of carrying the aforesaid stipulation into effect.

Upon the foregoing facts, the District Court ordered the entry of a decree declaring Low to be the lawful owner of the premises described in the complaint as against Sarah A. Blackburn and all persons claiming under her ; and commanding him to convey ten feet of the ground free of incumbrances to the said Sarah. We think the Court, in making this order to convey, manifestly erred. In doing so, however, we believe the District Judge was unquestionably influenced by the clause in the aforesaid stipulation, and a laudable desire to settle and determine the whole controversy, and thereby prevent any possible future litigation for the enforcement of that stipulation. But as the case stands, the agreement to convey the ten feet of ground could not be enforced at the time, even by a bill for a specific performance, for the reason that the conveyance was subject to a condition not yet performed. By the agree-

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ment, Low's obligation to convey did not mature. He was to convey when his title should have been perfected. This was not yet consummated. On the contrary, the defendant Sarah A. Blackburn, by her defense in this suit, is resisting the efforts of Low to place himself in the necessary position to convey to her a clear title pursuant to the terms of the stipulation. The perfecting his title to one-tenth of the whole claim, was a condition precedent to the executing a conveyance of the ten feet. And Courts of Chancery do not, under such circumstances, decree a specific performance.

If this relief be refused in a case where a complaint is filed for that special purpose, there can be no reason or authority for granting it upon an answer.

But this case stands in a still worse light. The answer prays for no affirmative relief. Neither does it advance a single fact or statement upon which the Court would be authorized to grant such relief. Even in equity, where technicalities are mostly discountenanced, a party can have relief, if at all, only upon the allegations in the pleadings.

No decree can be made in favor of a party upon grounds not set forth in his complaint or answer. The rule is absolute, in Chancery, that a party can only recover upon the case he presents. *Secundum allegata et probata*. *Bayley vs. Ryder*, 10 N. Y. R. 363, 370; *Byrne v. Romaine*, 3 Edw. Ch. 446-7; *Beatty v. Swarthout, &c.*, Barb. Sup. Ct. Rep. 203-4.

Again, the decree under review, in our opinion, is erroneous in other particulars, and seems inconsistent with facts found by the Court. As matter of fact the Judge finds that the defendant Small, on behalf of the infant, asserts and claims title adversely to the plaintiff, yet the decree against him with costs in his favor; and in doing so, necessarily gives him unbridled license to continue the assertion of such adverse claim. This ought not to be tolerated.

If the mother is legally restrained from asserting her adverse claim, so should any other person standing in the same relation to the property. The right which the infant claims is identical in all its features with that of the widow of deceased. The claims of both are joint for the same subject, derived from the same source, and equally unfounded (if not just) in the eye of the law. Under the facts and circumstances of this case, if the law will silence the

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claims of the one, it is but right, as well as logical, that the same law will silence the claim of the other. As to this the guardian, Small, stands in the same relation to this property, as regards his right to assert this adverse claim, as does Sarah A. Blackburn. And if he were permitted to do in his fiduciary character what the other defendant is restrained from doing, any decree made in this case would be shorn of its efficacy. All that would be necessary on his part would be to increase his industry in the slander of the title, and thus counterpoise the silence imposed by the law upon his co-defendant. Hence it follows that Small also should be restrained from setting up or asserting, as such guardian, any adverse claim to the property described in the complaint.

In conclusion, we glean from the record the following additional facts :

John L. Blackburn, in 1860, conveyed and transferred this ground, and the Court finds that the title so conveyed was in Low, at the commencement of this suit. Blackburn died in 1861.

Then, if the deed of conveyance in 1860 was sufficient to transfer his title and interest, and this title was in Low when this suit was instituted, (which facts the Court below finds) it follows, as matter of law, that neither the widow, Sarah, nor the infant, Minnie, has any estate or interest in the disputed property. It is but proper, however, to say in this connection, that anything advanced in this opinion is not intended to affect or prejudice in the least degree any legal or equitable right to which the infant, Minnie Blackburn, may be entitled. If she have any, the law will restore it when she reaches her majority.

The decree of the District Court is reversed, and the cause remanded for re-hearing, with leave to the defendant, Sarah A. Blackburn, to amend the answer so as to conform with the suggestions in this opinion, as to the stipulated ten feet of ground ; each party paying their own costs on this appeal.

Judge BEATTY being disqualified, did not participate in this decision.

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CHARLES L. LOW, APPELLANT, v. CROWN POINT MINING CO., RESPONDENT.

APPLICATION FOR A WRIT OF PROHIBITION.

An Order of Prohibition may issue from this Court in a proper case to arrest the progress of a trial. But such order should not issue when there is other and adequate remedy.

The office of such writ is not to correct errors, but to prevent Courts transcending the boundaries of their jurisdiction.

When, in an action of ejectment, the defendant, in addition to its legal defenses, sets up also an equitable defense, and asks affirmative relief, to wit: to declare that the deed under which plaintiff claims is only a mortgage, and this equitable branch of the case is tried separately from and disposed of before trying the legal defense: *Held*, that an order made and entered up in the form of a decree declaring that the instrument was not a mortgage, but a valid deed, conveying title to plaintiff, is not a final judgment from which defendant can appeal. There cannot be two final judgments in the same action.

When there are two distinct defenses, it is not the proper practice to impanel one jury to try the equitable defense, and another the legal defense. It is, however, proper to keep the two defenses separate. The Judge, himself, may first hear and determine the equitable side of the case; or, if in doubt, he may submit special issues to the jury who are to try the law side of the case.

Upon this writ of prohibition we cannot review an interlocutory order made in the Court below. That can only be reviewed on appeal from the final judgment.

THIS case was pending in the District Court of the First Judicial District, before the Hon. RICHARD RISING, presiding.

It was an action of ejectment for an interest in certain mining grounds. Among other defenses set up, was an equitable one, alleging that plaintiff only claimed title through a certain deed, absolute on its face, but which was, in part, only a mortgage. The defendant asked the Court to declare this deed a mortgage, and for other equitable relief. This equitable branch of the case was first disposed of; and being determined against the defendant, notice of appeal was filed and served, and undertaking on appeal filed. The defendant then asked a stay of proceedings until this appeal could be disposed of. This the Court below refused. The defendant then applied to this Court for a writ of prohibition, to arrest the further proceedings of the Court below until the appeal

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could be heard. This Court granted the writ, *ex parte*, but on full hearing set aside the writ, and ordered the Court below to proceed.

Aldrich & DeLong, for Defendant in the Court below, applied for the writ.

Williams & Bixler, who represented their Plaintiff in the Court below, moved this Court to set aside the order for the writ, which was granted *ex parte*.

The argument was oral, and no briefs were filed on either side. Among the papers in the case is a memorandum (by whom filed or made does not appear) referring to the following authorities :

As to the proper course of proceeding when there is an equitable defense: *Thayer v. White*, 3 Cal. 229-30; *Arquillo v. Edinger*, 10 Cal. 160; *Estrada v. Murphy*, 17 Cal. 273; *Webber v. Marshall*, 19 Cal. 457; *Lastrado v. Barth*, 17 Cal. 671; *Downer v. Smith*, 24 Cal. 125.

Defense: that a deed absolute on its face is only a mortgage, is an equitable defense. *Despard v. Wallbridge*, 15 N. Y. (1 Smith) 378.

In what cases the writ of prohibition lies. *Washburn v. Phillipi*, 2 Metcalf, 296.

Cases as to the effect of an appeal: *Woodbury v. Bowman*, 13 Cal. 634; *Ford v. Thompson*, 19 Cal. 119; *Pierson v. McCahill*, 23 Cal. 252; *Thornton v. Mahoney*, 24 Cal. 583; *McGanahan v. Maxwell*, Cal., not yet reported.

From what an appeal may be taken: Statutes of 1864, page 81 Sec. 30; Statutes of 1861, page 363, Sec. 285; *Hopper v. Faulkner*, 17 Cal. 517; *Rhodes v. Craig*, 21 Cal. 419-423; *Swartwart v. Curtis*, 4 Comstock, 416; *Humphrey v. Chamberlin*, 1 Kern. 274; *Tompkins v. Hyatt*, 17 N. Y. (5 Smith) 534; *People v. Merrill*, 4 Kern. 74, 2d Whitaker Pr. 797; *Jenkins v. Wild*, 14 Wend. 542; *Johnson v. Everett*, 7 Page, 636; *Baker v. Baker*, 16 Cal. 527; *Juan v. Ingoldsby*, 6 Cal. 439.

What a perfected appeal stays: Statutes of 1861, p. 864, Sec. 291; *Merced Mining Co. v. Fremont*, 7 Cal. 130-32; *Hicks v. Michael*, 15 Cal. 107, 110-11; *Hoyt v. Gilston*, 13 John. 139.

Opinion by BROSNAN, J.

This action, while in progress of trial in the District Court, was temporarily arrested by an order of prohibition from this Court.

The power of the Court to make such an order in a proper case is unquestionable, because it is expressly authorized and conferred by the Constitution of the State. (Constitution of Nevada, Art. 6, Sec. 4.) Nevertheless, the writ ought not to issue where there is another and adequate remedy. Properly speaking, the office of the writ of prohibition is not to correct errors, but to prevent Courts from transcending the limits of their jurisdiction in the exercise of *judicial* but not *ministerial* power. (2 Hill, 367 *et seq.*; also *Id.* 363.) This application is made principally on the ground that no appeal lies in this instance, and therefore this Court should quash the writ and permit the trial to proceed to a termination in the Court below.

The facts, so far as necessary to be stated for a clear understanding of the single question before us, are these: The complaint is in ejectment and contains the usual allegations. The answer sets up a general denial and other defenses. It also sets up a strictly equitable defense. In this, that the asserted title or claim of the plaintiff is derived from, and through a deed of conveyance, absolute upon its face, but which in fact is claimed to be a mortgage to secure the payment of an antecedent debt—a defeasance having been executed and delivered contemporaneously with the deed.

The answer prays an affirmative relief, that the deed be declared by the judgment of the Court a mortgage, that an account of the amount due thereon may be taken, and that the defendant be permitted to pay whatever amount may be found due, and thereby redeem the property from incumbrances.

Upon the trial the parties first proceeded to try the issues raised by this equitable defense, leaving the law branch of the case to be afterwards tried. A jury was thereupon impaneled and sworn to try the equity side of the case. But no issues were framed for submission to the jury, and it seems that after the defendant had closed its evidence on this branch of the case, the District Judge withdrew the matter from the jury, on the ground, we presume,

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that this equitable defense had not, in his opinion, been sustained. That jury was discharged, and another was impaneled to try the issues of law. Meanwhile, upon the termination of the equitable defense in the mind of the Court, a decree, as if made upon a distinct and independent bill in equity, was signed by the Judge, filed and entered. This judgment or decree adjudged, not only that the deed alleged to be a mortgage is an absolute deed, but it further declares that the premises described therein (the property in controversy) were duly conveyed to the plaintiff. From this alleged decree, the defendant instantly undertook an appeal to this Court, filing the usual notice and undertaking. Having done this, the Court was applied to for a writ to stay the progress of the trial below until the appeal should be determined (the Court below having refused a continuance) upon the assumption, or rather ground, that the appeal had taken the case bodily from the Court below, and deprived that Court of further jurisdiction for the time being.

Upon full consideration of those facts, we have come to the conclusion that an appeal at present does not lie in this case—that no such final judgment as warrants an appeal has been entered, or could have been entered, at the stage of the trial when this alleged decree was entered. There cannot be two *final* judgments in the same action, and each one the subject of appeal. If there may be two, there may be more. Such practice, if tolerated, would encourage and stimulate litigation, instead of preventing a multiplicity of suits and appeals, which is the plain and acknowledged intention and object of our code of procedure, as has been frequently declared by the Courts of the State from which our system has emanated. Another serious objection to the exercise of this right of appeal, in the present condition of this action, presents itself. It is this: This action is one—single; and no matter how many intermediate orders, entries, or decrees (name them as you please) the Court may make during its progress to a final determination of the right of the respective parties litigant in the principal subject matter, whenever the controversy is brought to an end, then the judgment becomes a finality, and should be one, single, like the action which it determines. It should, however, be so comprehensive as to dispose of and settle all material and disputed points presented by the pleadings, unless this course of practice be

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observed and followed. Aside from the objection already advanced, and others that might be mentioned, there must be embarrassment and difficulty in the introduction of a judgment record in evidence in any future action where its use and effect may be necessary. The judgment roll is the first and best evidence in the way of estoppel or otherwise. Our statute declares of what that roll shall consist. It must contain the summons, the pleadings and judgment, and any orders relating to the change of parties. (Laws 1861, p. 347, Sec. 203.)

But if there be two final judgments in the same action, this statute cannot be complied with. We do not forget the fact that appeals may be taken from certain orders and decisions of Courts before final judgment. But such are expressly authorized by statute, and this is not one of the enumerated cases. (Statutes of 1864, p. 81, Sec. 30.) No appeal lies from an order made before final judgment, except in the cases specified in this statute. Therefore, regarding the alleged decree of the District Court, as we do, of no more effect than simply as an order made in the cause, and not being embraced within those interlocutory orders declared appealable by the statute, we must hold the appeal to be ineffective, and of course inoperative in staying the trial.

A judgment is the "final determination of the rights of the parties in the action." This is the definition given to it in the New York code, and it is defined in the very same words in our statute. (Laws of 1861, p. 338, Sec. 144.) In support of our opinion that no final, and therefore no judgment that could be legally appealed from, has been rendered in this action, we refer to the following cases, determined under and since the New York code went into operation: 4 Coms. N. Y. Rep. Court of Appeals, pp. 415-16; 2 Kernan, (same Court) pp. 591-2; 5 Smith, (same Court) pp. 534-5.

We might rest here, but in view of the mode in which the trial has been thus far conducted, it may be proper to make some further suggestions. Judging from the formality and character of what is called a decree in this case, it would seem as though there had been two distinct actions before the Court. There could have been no possible necessity for such a course. This is not advanced with any view of censure as regards Court or counsel, but because

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such mode of proceeding enhances—and that unnecessarily—the costs of the parties litigant, and because it is anomalous, and we think unprecedented, that different juries should be sworn to try different parts or issues in the same cause on the same trial. We do not, however, think it improper that in cases of this character, when an equitable defense is interposed, this particular defense should be first disposed of. Indeed we have no doubt that the equitable defense should first be tried. The reason of this course is manifest to every tyro in the profession. But this could have been done, and we think it ought to have been done, by the Judge sitting as a Chancellor in the first instance; and if he was fully convinced as to the sufficiency or insufficiency of the equitable defense, he could exclude or receive it upon the trial of the legal issues as his judgment should sway. If he had doubts upon any points, the solution of which required the enlightenment of his conscience, he could have framed special questions of facts or issues, as they are technically denominated, to be answered by the jury trying the main cause. In this way, no matter how the general verdict may go—whether for plaintiff or defendant—if it be contrary to the effect of the special findings, or as they are sometimes called, special verdict, the general verdict must yield, and judgment will be entered according to the force and legal effect of the special findings. The decree so called, to which allusion has been made, and which was supposed to be appealable, we think trenches upon the province of the jury as regards the legal side of the case. It goes too far in stating that the premises in dispute were duly conveyed to the plaintiff. The equitable question to be determined was whether the deed was not in fact a mortgage. That fact having been determined in the mind of the Court, the trial could have proceeded, and whether an order declaring his conclusion had been entered or not, would have made no difference to the Court in its ruling on the trial. But on this application we cannot modify or correct it, as it is not before us properly for review. It will be subject to the examination of the Court, if the case should hereafter come before us upon appeal from the final judgment in the case.

The Court was in hopes of having longer time for the preparation of their written opinion in this case, their decision having

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already been orally announced. But upon the request of counsel, and from deference to that request, and especially in view of the fact that our opinion may aid somewhat in the trial of the cause now in progress, we have denied ourselves the leisure to present our views so elaborately and methodically as we would desire. However, we have no doubt as to the correctness of the conclusion at which we have arrived.

It follows that the writ of prohibition heretofore issued should be recalled and set aside.

It is so ordered ; and the District Judge is directed to proceed and try the aforesaid action.

The defendants will pay the costs on this appeal.

JOHN C. SCOTT, RESPONDENT, v. THE BULLION MINING
CO., APPELLANT.

When two cases are pending in the same Court, between the same parties, a deposition may be taken upon one notice, affidavit, and commission, to be read in both cases.

A deposition taken in one case may be used between the same parties in another ; so a deposition entitled in two cases between the same parties may be used in either.

Where the deposition of the same witness is taken twice, and it appears that the first examination covered the whole ground of controversy, and was regularly taken, the Court might, perhaps, with propriety refuse to hear the second deposition. But if the first deposition is complete, the regular method would be to appear and contest the issuance of the second commission.

APPEAL from the District Court of the First Judicial District,
Hon. R. S. MESICK presiding.

Williams & Bizler, for Appellant.

Respondent waived any objections there might be to the taking of the deposition in this form by appearing and proposing cross-interrogatories, without objecting.

There is, in fact, no objection to entitling a deposition in two cases between the same parties, and involving the same issue of fact, to be read in each. 1 Greenleaf on Evidence, Secs. 552 to 554 ; 12

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Sargent and Rawl. 80 ; 2 A. K. Marshall, 525 ; 4 Dana, 166 ; 5 B. Monroe, *Grigsby v. Daniel*, 435 ; 7 Monroe, 578 ; 2 Daniels' Ch. Pr., Perkins' edition, pp. 1011 to 1014.

C. E. DeLong, for Respondent.

It was not proper to allow the deposition taken on commission to be read, because the deposition of the same witnesses had previously been taken when both parties were present, and a full cross-examination had. And respondent offered to allow this prior deposition to be read, waiving all objections on the ground that it had been improperly in the hands of the appellant, and opened by its officers.

The law does not authorize the taking of one deposition for two cases. The witness should be separately sworn to each case. Appellant waived nothing by appearing when notified. We do not object to the sufficiency of the notice and affidavit, but to the regularity of the commission. The notice may have been sufficient, but regularly two commissions (one for each case) should have been issued. The issuance of the commission was subsequent to time of respondent's appearance to the notice ; no irregularity in this was waived.

The rules regarding depositions in chancery cases are not applicable to actions at law. The authority for reading depositions in a court of law can only be found in the statute. *McCann v. Beach*, 2 Cal. 25 ; *Dye v. Bailey*, 2 Cal. 383.

Opinion by LEWIS, C. J., full Bench concurring.

The principal question involved in this appeal, and the only one which we deem it necessary to pass upon, arises upon the ruling of the Court below in rejecting the depositions of Harter and Forcade. The objection urged against their admission by counsel for plaintiff was, that the affidavit, notice, and commission upon which the depositions were taken were all entitled in two different actions, viz : *John C. Scott vs. The Bullion Mining Company* and *The Bullion Mining Company vs. John C. Scott*.

These two actions, it appears, were pending in the same Court at the same time : the one an action for ejectment brought by Scott to recover a certain interest in the Bullion Company's mining ground,

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and the other an action to quiet title brought by the Bullion Company against Scott. The defendant wishing the testimony of Harter and Forcade, who were residing in the State of California, made application for a commission for their examination. The notice of application, the affidavit of James M. Walker, upon which the application was made, and the commission, are all entitled, as before stated, in both actions. The notice informed the plaintiff, that upon the 9th day of March, A.D. 1865, application would be made to one of the District Judges of the County of Storey for a commission to take the deposition of Isaac M. Harter and Jacob Forcade in the two actions then pending between the plaintiff and defendant in the District Court of Storey County, i. e., *Scott v. Bullion Company* and *The Bullion Company v. Scott*, and the commission directs the commissioner to take the depositions of Harter and Forcade in answer to the interrogatories annexed, as witnesses in the two actions above mentioned. No cross-interrogatories were filed by the plaintiff. The depositions were taken and properly returned, but upon the trial, counsel for plaintiff objected to the reading of them, for the reason before stated. The objection was sustained, and this ruling is assigned as error. The objection was not well taken, and, in our opinion, the Court below erred in rejecting the depositions. Though the issuance of one commission in two or more cases, situated as these are, may not be commendable practice, we cannot say that it is not a substantial compliance with the statute. Section 380 of the Practice Act provides the manner in which the deposition of a person not residing in the State may be taken. That it shall be upon "commission issued from the Court under the seal of the Court upon an order of the Judge or Court, or Probate Judge, on the application of either party, upon five days' notice to the other." "It shall be issued to a person agreed upon by the parties, or, if they do not agree, to any Judge or Justice of the Peace selected by the officer granting the commission, or to a commissioner appointed by the Governor," etc. Unless it is claimed that a commission to take testimony in two actions is a commission in neither, it would seem that the proceedings to obtain the depositions in question were in substantial compliance with section 380.

The notice itself is unquestionably sufficient in either of the cases.

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How, therefore, merely making it a notice in both, destroys it so that it is a notice in neither, we cannot see.

Hence, in our opinion, notice was given in both actions. An affidavit was also made in both, and the commission authorizes and directs the commissioner to take the depositions in both case. True, there was but one notice, one affidavit, and one commission in both cases, but the notice, affidavit and commission were all so formed as to answer all the requirements in both actions, and the mere fact that there was not a distinct set of these papers in each case should not prejudice the parties interested when the requirements of the law are substantially met by one set, as in this case.

But there is another reason for this view of the question. The taking of testimony by deposition is purely a chancery practice, and was never recognized in the Courts of law until the innovation of the modern practice.

The Common Law recognized no testimony except such as was delivered *viva voce* in open court, whilst the Courts of Chancery have always possessed and exercised the power to issue commissions for the examination of witnesses, and the manner of executing the commissions and returning the same depended upon the rules and practice of the Court rather than upon any statutory provisions. (*Brown v. Southworth*, 9 Paige, 350.) When, therefore, this practice of issuing commissions for the examination of witnesses and issuing depositions is extended to Courts of Law by statute, the same rules which govern the Courts of Chancery in receiving them should also be recognized by the Courts of Law in the absence of any direct statutory provisions. For it seems to us the most obvious suggestion of reason, that when the Statute confers upon the Courts of Law any Chancery powers, the same rules by which the powers were exercised by Courts of Chancery should govern the Courts of Law in the exercise of them. The Statute, of course, so far as it prescribes the mode of procedure, must be strictly complied with; but beyond that, and in the absence of any statutory rules, the rules adopted in the Courts of Chancery should govern. Our Statute only prescribes the manner in which depositions may be taken, and we are compelled to resort to the practice in chancery for the rules governing the use of them when so taken. So far as the statutory requirements are concerned, they have been followed. If then, by

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the practice in chancery, the depositions of Harter and Forcade would be admissable, they were so in this case on the trial in the Court below. It is an old rule in Chancery that a deposition in one suit may be used in another between the same parties, where the same question is involved in both. (2 Daniels' Chancery Pr. 1011, 2 A. K. Marshall, 525.) Surely we can see no reason why one deposition which is taken in two cases cannot be used in either. Under that rule it was of no consequence what the title of the action might be in which the deposition was taken, to entitle a suitor to use it in another and entirely different action between the same parties—it was only necessary to show that both suits involved the same question.

There seems to be no good reason, then, why a deposition bearing the title of two actions should not be used in any action involving the same question between the same parties, and certainly not in either of the actions in which it was in fact taken. The case of 7 Monroe, 576, seems to be directly in point, sustaining our view of the question; and we do not now see sufficient reason to justify us in disregarding its authority in this case.

There may have been good reasons for rejecting the second depositions, but none appear in the Transcript.

The ground taken by the Court below for its ruling is utterly untenable. If the first depositions were full and complete, covering all the points in the case, and there was no legal objection to their being used on the trial, it would have been proper for the Court to reject the second depositions and allow the first to be used; although the better practice in such cases would be to appear and object to the issuance of the second commission. In this case, had it been shown that the first depositions contained a full and complete examination of the witnesses, and that there was no legal objection to their being used, we could not say that the Court below erred in ruling out the second depositions. This is not, however, shown; and from the testimony and facts before us, it is impossible to say that the second was not issued for the purpose of taking the testimony upon some question omitted in the first depositions, or for the purpose of making some point more clear or explicit.

But as the reason upon which the Court below rejected the second deposition is untenable, and no other appearing in the Trans-

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cript, we are compelled to reverse the judgment and award a new trial, and it is so ordered.

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THE MAYOR AND BOARD OF ALDERMEN OF THE
CITY OF VIRGINIA, APPELLANTS, v. THE CHOL-
LAR-POTOSI GOLD AND SILVER MINING CO.,
RESPONDENT.

Section 8, Article VIII, of the Constitution, requiring the Legislature to pass a general law for the organization of cities and towns is inoperative until acted upon by the Legislature.

Such sections, if standing alone, and not qualified by any other section of the Constitution, might raise a strong implied prohibition against the Legislature passing any special laws on the same subject.

Section 1, Article VIII, by much stronger implication, seems to reserve to the Legislature the power to pass special laws in regard to municipal corporations: that is, to create them; or, at least, to confer special and additional powers after they are in existence.

The City of Virginia was a municipal corporation when the Constitution was adopted, and has never ceased to be a corporation.

The law amending the charter is, therefore, constitutional.

The products of mines are personal property, and as such subject to taxation for municipal purposes.

All property within the municipality is subject to one annual taxation, and it makes no difference that it is removed beyond the corporate limits before the amount of tax is specified; or the mode of collecting established.

The Constitution requires that all *ad valorem* taxes shall be as nearly equal as may be. We cannot see that the mode of assessing the products of mines violates that principle of equality.

The municipal authorities of the City of Virginia may add a penalty for refusing to give the Assessor proper information to enable him properly to assess the products of a mine.

APPEAL from the District Court of the First Judicial District, the Hon. R. S. MESICK, presiding.

The facts are stated in the opinion.

Clark Churchill and McRae & Rhodes, for Appellants.

The power of the Legislature over the subject of taxation is unlimited (Blackwell on Tax Title, pp. 8 & 9). So the mode of assessing rests with the Legislature. *People v. Mayor of Brooklyn*, 4

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Comstock, 420, 425-6; *Burnett v. Mayor of Sacramento*, 12 Cal. 76; *Blanding v. Burr*, 13 Cal. 343-351; *People v. Seymour*, 16 Cal. 332; *People v. Holiday*, 25 Cal. 300.

There is no constitutional objection to passing tax laws which are retroactive. The only objection to such laws is one of policy.

See *Von Schmidt v. Huntingdon*, 1 Cal. 65; *Thorne v. City of San Francisco*, 4 Cal. 127.

The same doctrine is held in New York, *Jones et al. v. Still et al.* 9 Barb. 482. See Abbott's Digest, 5 Vol. p. 81, Secs. 57-66 incl. So in the Courts of the United States. See *Calder et Ux. v. Bull et Ux.*, 3 Dall. 386; 1 Cond. 172. See also *Providence Bank v. Billings et al.* 4 Pet. 514, Charles River Bridge Case, *Hart v. Lampleire*, 3 Pet. 289; *President Charles River Bridge v. Warren Bridge*, 11 Pet. 420.

Hillyer & Whitman, for Respondents, made the following points :

1. The City of Virginia has no existence, the charter being unconstitutional. Constitution of Nevada, Art. 8, Sec. 8.

2. The ordinance was made without authority. Constitution of Nevada, Art. 10, Revenue Act, Stat. Nev. 1864-5, pp. 271, 315; Charter City Virg. Stat. Nev. 1864-5, pp. 209, 218.

3. It is retroactive, and therefore unconstitutional. Sedgwick on Stat. and Const. Law, pp. 188, 189, 190; Smith's Commentaries on Statutory and Constitutional Construction, p. 306, sec. 169.

4. It attempts to tax property belonging to a citizen of another State when the property is not within the State. This cannot be done. *State of Nevada v. John O. Earl et al.*, Supreme Court, Nevada; Rev. Act, Nevada Stat. 1864-5. To the point of citizenship, see *Ohio & Mississippi R. Co. v. Wheeler*, 1 Black, 286, and cases there cited.

5. The ordinance attempts to assess by legislation. Such assessment is void. *Ferris v. Coover*, 10 Cal. 632-3; Charter City Virg. Nev. Stat. 1864-5. See Bouv. Title Assess—Assessor.

6. If the power to levy a tax was in the plaintiff, yet there was no power in it to attach the extraordinary penalties. The city possesses no powers except those expressly granted by Statute, or such

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as are necessary to carry such powers into effect. *Lowe v. City of Marysville*, 5 Cal. 214; *Hodges v. City of Buffalo*, 2 Denio, 112; *Douglas v. Mayor of Placerville*, 18 Cal. 647, and cases there cited.

Opinion by BEATTY, J.

This was a suit brought for the collection of municipal taxes alleged to be due from the defendant to the city of Virginia for taxes on the products of a mine.

Virginia was a city existing under Territorial law when the Constitution was adopted. In March, 1865, the State Legislature passed a law, re-chartering the city, and repealing the former law, granting a charter, so far as it was inconsistent with the new Act of Incorporation. Section 17 of the Act of March, 1865, empowers the Board of Aldermen "To levy and collect taxes on all property within the city, both real and personal, made taxable by law, for State or county purposes." Section 20 of the same Act authorizes the Board to provide by ordinance, the manner of assessing and collecting taxes.

The first election under the new charter took place the first Monday in May. The new officers qualified the second Monday of May. The Board of Aldermen in the month of September following, passed an ordinance prescribing the mode of assessing and collecting taxes.

That ordinance provided for a quarterly assessment and payment of the tax on the proceeds of the mines; the first quarter to commence the last Monday of May, and end the last Monday of August, 1865. The ordinance in prescribing the manner of assessing the taxes on the proceeds of mines follows the same course prescribed by the State Legislature for assessing them for State purposes. That is in substance, to ascertain the amount and yield of ores from each mine, for one quarter, to deduct from the gross yield first twenty dollars per ton; then to deduct from the remainder one-fourth, or twenty-five per cent., and to assess the remaining three-fourths at the same ad valorem tax as other property. The complaint sets out all the foregoing facts, and many other facts to which it is not now necessary to allude, as the contested points in the case will be explained by the foregoing statement and such

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additional facts as we will be obliged to allude to in the course of this opinion.

The Court below sustained a demurrer to the complaint, and entered judgment for defendants, and the plaintiff appeals to this Court from the judgment rendered by the Court below.

We will follow the counsel of respondent in noticing the different grounds on which they claim the judgment must be sustained.

First, it is claimed that the city of Virginia is not a corporation, and its Aldermen have no municipal powers for the reason that the law of March, 1865, granting the new charter, is void, because it is in conflict with Constitutional provisions. Section 8, article 8, of the Constitution is in these words: "The Legislature shall provide for the organization of cities and towns by general laws; and restrict the powers of taxation, assessment, borrowing money, contracting debts and loaning their credit, except for procuring supplies of water."

Here is a requirement of the Legislature to do a certain thing, to pass a general law on a certain subject. This provision of the Constitution remains inoperative until the Legislature performs its duty; at least it remains inoperative so far as any positive effect is to be given to it. But it may be contended that it has a negative effect—that it raises an implied prohibition against the Legislature passing any *special law* for organizing cities or towns. Although there are no negative terms in the clause, if it stood alone and was not qualified by any other clause, we would certainly be inclined to hold that such was the intention and effect of the section. Otherwise it would be useless, for if the Legislature first passes a general law, and then goes on to pass a special law, organizing each new town or city as it comes into existence, the general law would be a dead letter in the Statute Book. Doubtless the framers of the Constitution intended that section of the organic law to have some beneficial effect. But there is another section of the Constitution, *to wit*: section 1, of article 8, which we think settles this question. That section reads as follows: "The Legislature shall pass no special act in any manner relating to corporate powers, except for municipal purposes; but corporations must be formed under general laws; and all such laws may, from time to time, be altered or repealed."

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The expression, "in any manner relating to corporate powers," is a rather ambiguous phrase, but we think the framers of the Constitution meant by that language to prohibit the *formation of corporations by special acts*. The subsequent language, "but incorporations may be formed under general laws," shows that was the meaning intended to be conveyed. Then, to use more appropriate language, the section would read in this way: "The Legislature shall pass general laws for the formation of corporations; but no corporation (except corporations for municipal purposes) shall be created by special act."

This, we think, is what the Constitution meant to express.

Is there not here positive implication that the Legislature may create municipal corporations, much stronger than the negative implication in section eight, that they shall not? Besides, the power to create municipal corporations is one usually exercised by State Legislatures, and we ought not to infer that the Legislature of this State was inhibited from the exercise of such power, unless the Constitution is reasonably clear on the point.

But there is another view to take of this power. It may be that the Convention intended by section eight to provide that all new towns and cities should be *organized* under a general law. After they were once organized, if their size, circumstances, and necessities required more extensive, or more restricted limitations upon the municipal officers than those conferred by the general law, the Legislature might apply the remedy by special act. If such was the intention, we think the new charter was framed strictly in accordance with the idea. Virginia was a chartered city when the Constitution was adopted; it was already organized as a municipal government. It has never ceased to be such. The new charter is, in effect, but an amendment of the old one. If the Legislature could pass any special law in respect to municipal corporations, (and of that we have no doubt) we think there is no constitutional objection to this one.

The Act creating the new charter expressly authorizes the Board of Aldermen to provide for the levy, assessment, and collection of a tax on all property, real and personal, in the city, which is subject to taxation for State and county purposes.

Admitting the City of Virginia to be a legally constituted cor-

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poration, it is contended the corporate authorities had no power to levy this particular tax on the proceeds of the mines.

The corporation is authorized to tax "all the property, real and personal, in the city, which is subject to taxation for State and county purposes."

But, say respondents, these ores attempted to be taxed are not *real estate* in the nature of things, and not *personal estate* because the statute declares they are not.

The fifth section of the Revenue Act defines real and personal estate, and winds up with this proviso: "That gold and silver bearing ores, quartz, or minerals from which gold or silver is extracted, when in the hands of the producers thereof, shall not mean, nor be taken to mean, nor be listed and assessed under the term 'personal property,' as used in this section of this Act, but is specially excepted therefrom, and shall be listed, assessed, and taxed as hereinafter provided."

As we understand this proviso, it does not intend that ores which are the products of mines shall in no case be held or treated as personalty, but simply that such ores are not to be considered as included within the definition of personal property, as used in that section, and that they are not to be listed or taxed under the general provisions in regard to personal property, but under other and special provisions as to the product of mines. We think the products of mines are personal property subject to taxation for State and county purposes, and also to municipal taxation, under the law conferring the taxing power on the corporate authorities of Virginia. It is further objected, that this assessment was on property not in the city when the ordinance was passed for the assessment. The assessment was on property which was in the city after the passage of the law by the Legislature.

All property within a city or State, except that which is *in transitu*, is liable to one annual taxation. The Act of the Legislature was sufficient authority for taxing all property within the city after the passage of that Act. It made no difference when the ordinance was passed or the assessment made, if it were owned and held in the city at any time during the year after the law was passed, it was subject to taxation. The duty to pay a tax on the property arose whilst the property was in the city. It could make

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no difference that it was removed from the city before the ordinance was passed prescribing the amount of tax to be paid, and the manner of assessing and collecting. There is no objection to making an Act so far retroactive as to enforce the performance of an existing duty. We do not think the position that the ordinance is void, because it attempts to assess by legislation, is tenable.

The tenth article of the Constitution provides: "The Legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal or possessory, except mines and mining claims, the proceeds of which alone shall be taxed."

The leading feature of this section is that the taxation shall be equal and uniform, and that the proceeds of the mines only shall be taxed. In other words, whilst the body of the mine remains untaxed, the ore taken out (for that is the primary proceeds of the mine) shall be subject to the same *ad valorem* taxation as other property. The mode of assessment prescribed by the Legislature, and followed by the city ordinance, was doubtless intended to arrive at the true value of the ore, and tax it at that value. It is evident when the ore is taken out of the mine it is not worth what it will yield; for if ore be taken out which, by working process, will only yield twenty dollars per ton, and it costs twenty dollars to haul it to a mill and have it worked, it is really worth nothing; hence it was very properly provided that in assessing ores, twenty dollars per ton should be taken from the actual yield of such ores, that being generally considered about the cost in the principal mining districts, of hauling ores to the mill and working them, at the time the law was passed. In addition to the deduction of twenty dollars per ton, there is a deduction of twenty-five per cent. from the remainder. Why this latter deduction was made it would be hard to say, but this is not injurious to those who pay taxes on the proceeds of mines, and they have no right to complain. There ought to be some settled mode of ascertaining the value of ores or the proceeds of mines. The Legislature is the body to prescribe that method. If there is nothing in the manner prescribed grossly unjust and in violation of that principle of equality prescribed in the Constitution, this Court would not interfere with their action.

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Absolute equality in assessments is known to be impossible. We do not see anything in the mode prescribed by the Legislature, and followed by the ordinance, which so far violates the principles prescribed in the Constitution as to authorize us to say the spirit of that instrument has been disregarded. The fixing of a valuation of five hundred dollars per ton on all ores, when the owners or managers of mines refuse to furnish the means of making a more correct assessment, is apparently a rather harsh rule, but there is no difficulty in avoiding such assessments. If a party willfully refuse information, it is but a just penalty for neglecting to perform a plain duty ; in such case they can only blame themselves.

As the Board are authorized to prescribe by ordinance the method of enforcing payment of these taxes, we see no reason why they may not add a penalty for not paying the taxes when demanded, which shall compensate the city or its attorney for the trouble and delay of enforcing the collection. The judgment is reversed. The Court below will reinstate this cause on the calendar, overrule the demurrer, allow the defendant to answer if it chooses to do so, and proceed with the trial of the cause.

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B. F. HASTINGS & CO. v. THE BURNING MOSCOW CO.

Neither the written stipulation in this case, nor the recitals in the judgment, show that defendant consented to a judgment for gold coin. Even if such consent had been given, it would not have conferred on the Court authority or jurisdiction to enter such a judgment.

Although that part of the judgment requiring payment in gold coin was void, yet it might be injurious to defendant.

This Court will reverse not only erroneous judgments, but void judgments.

APPEAL from the District Court of the First Judicial District,
Hon. RICHARD RISING presiding.

The facts are stated in the Opinion.

Hillyer & Whitman and *J. H. Hardy*, for Appellants.

It is error to enter judgment for gold coin. (*Burling v. Goodman*, 1 Nevada, 314 ; *Milliken v. Sloat*, 1 Nevada, 584 ; *Mitchell*

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v. *Bromberger*, 1 Nevada, 607; *Fox v. Barstow et al.*, 1 Nevada, 612.)

The recitals in judgment do not show that defendant consented that judgment should be entered for gold coin; even if such consent was given, it could not authorize the Court to do an act which is illegal, and in violation of the Act of Congress.

Crittenden & Sunderland, for Respondents, made the following points:

1. There is no error in the judgment which requires reversal, or even modification.

2. If there is any error in the judgment, it should be corrected not by reversal, but by modification not affecting rights arising under the judgment.

3. The judgment in this case was entered by consent in open court, and appellant cannot object to its form. However valid an objection may exist to it, consent waives it. The appellant is estopped from raising it. The maxim "*Volente non fit injuria*," applies. (2 Bouvier's Law Dictionary, 149; 2 Burrill's Law Dictionary, 1049; 1 Phillips on Evidence, 458; *Meerholz v. Sessions*, 9 Cal. 277; *O'Dougherty v. Aldrich*, 5 Denio, 385; *Brotherton v. Hart*, 11 Cal. 405; *Treadwell v. Wells*, 4 Cal. 263; *Imley v. Beard*, 6 Cal. 666; *Holmes v. Rogers*, 13 Cal. 200; *Coryell v. Cain*, 16 Cal. 572; *Sleeper v. Kelly*, 22 Cal. 456; *Milliken v. Sloat*, [in re-hearing] 1 Nevada; *McConnell v. White*, Minor, 112, cited 2 U. S. Digest, p. 189, § 837.)

The judgment is not founded on the stipulation. It does not purport to be founded on it, but is subsequent and overrules it. The stipulation was waived by the subsequent appearance of defendant, and consent to a different judgment. (Cases above cited; *Coryell v. Cain*, 16 Cal. 572; *De Leon v. Higuera*, 15 Cal. 494.)

It cannot be shown in this Court that the fact was not in truth as stated in the judgment—that is, that the defendant "did not confess judgment as stated, but only intended to confess it in the form warranted by the stipulation." Such a question must be first raised in the District Court, upon a motion to correct the entry of judgment. (*Clark v. Forshay*, 3 Cal. 291.)

Opinion by BEATTY, J., BROSNAN, J., concurring.

This was a case in which judgment was rendered against defendant upon two promissory notes and an account.

The judgment is in terms for *gold coin* of the United States, and the only error complained of is that the judgment calls for coin, when under the rulings of this Court, in *Burling v. Goodman*, the judgment should have been for money generally, and not for any particular kind of money.

The respondents make two answers to this assignment of error.

First—The judgment in this case was rendered in its present form by consent of appellants, and therefore they are estopped from appealing or complaining of any errors in the judgment.

Second—That the words “gold coin” are mere surplusage, and do not affect the validity of the judgment, or make it different in effect from what it would be if these words were not employed.

On the first point, two things are to be considered. First, did the appellants consent to the rendition of judgment in its present form; second, if they did assent, does it preclude them from now objecting.

When the case was first before the Court, it would seem the defendant (appellant) answered—filed some sort of petition, and made some motion in the case. Before the petition was disposed of, the following stipulation was filed :

“It is hereby consented and stipulated that the answer, petition, and motion on the part of defendant above named, are hereby withdrawn, and plaintiff allowed to take judgment according to the facts stated in their complaint.”

Immediately after the filing of this stipulation in this case, judgment was entered, and in the judgment is this recital: “and by consent of the said attorneys in open court the answer, petition, and motion of the defendant are withdrawn, and that judgment be rendered in favor of the plaintiffs and against the defendant for the several sums mentioned in the complaint herein, with the interest thereon, as claimed in said complaint.”

It is not claimed that the stipulation authorizes a gold coin judgment, but it is said the words “as claimed” in the foregoing quotation from the recitals of the judgment refer to the character of the

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judgment asked for in the prayer of the complaint, and the entry of judgment in gold coin. We think the phrase "as claimed" refers simply to the *interest* claimed. It means, taken altogether, that plaintiff may take judgment for the sums claimed in the complaint, with interest at *the rates claimed* in the complaint. We think the recitals have reference to the amounts and rates of interest admitted by defendant, and not to the form of judgment.

That was fixed by law, and required no admissions from the defendant; and none, in our opinion, is expressed or intended to be expressed in this recital.

We are satisfied if the defendants had in the most unequivocal manner consented to a judgment for gold coin, this Court would still have been bound, on appeal, to reverse or modify the judgment. When a defendant consents to a judgment against himself he must be held to admit every possible fact consistent with the pleadings which would be necessary to support the judgment. It may also be held that by consent he waives all errors. But no defendant can by consent confer power or jurisdiction on a Court to enter an illegal judgment or a judgment beyond the jurisdiction of the Court. If a man is on trial for larceny in a Court only having criminal jurisdiction, he can plead guilty; but he cannot at the same time authorize the Court to enter judgment in damages against himself and in favor of the prosecutor for the value of the goods stolen. So a man, if sued for a debt in a Court of civil jurisdiction, may come into a Court and assent to a judgment for the money, but he could not authorize the Court to add to the judgment an order that if the same was not paid in a certain time defendant should be imprisoned until the debt was paid.

In this case no judgment could be entered in gold coin without an express violation of law. We do not think defendant could authorize the Court to violate law.

With regard to the second point, that the words "gold coin" are mere surplusage, void and without effect under the rulings of this Court, we are compelled to differ with the counsel for respondent.

We do not hesitate to say that a tender of legal tender notes made and kept good would discharge a judgment for gold coin. But on the other hand, the Sheriff must obey the orders of the

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Court of which he is an officer. If the Court orders him to sell property for gold he must do so, or he is in contempt. The order, then, that the judgment must be made in gold coin, although void, is an order made by a Court having jurisdiction of the defendant, and also of the action in which the order is made.

This order, although void, may operate unjustly to defendant, and we see no reason why this Court may not correct it. This Court has jurisdiction of the parties and of the action, and we think should correct all illegal orders made in the case, although perchance where the order is clearly void the defendant might be able to maintain an action against a ministerial officer enforcing it. Appellate Courts frequently set aside void judgments, as well as those which are merely erroneous and not void. (See *Gray et al. v. Schupp*, 4 Cal. 85; *Zander v. Coe*, 5 Cal. 230; *Rudolph v. Thalheimer et al.*, 2 Kirnan, 593.) We have modified all judgments of this character heretofore before us, except in the case of *Mitchell & Hundley v. Bromberger*. That we reversed, because there were other seeming errors, and it did not appear to us full justice would be done either party by a simple modification. In this case we will pursue the same practice as heretofore in similar cases.

The judgment in the Court below must be so modified as to strike out all that part of it which relates to gold coin.

The Court below is ordered to make such modification. The appellant will recover its costs in this Court.

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J. C. CLARK, RESPONDENT, v. THE BURNING MOSCOW
COMPANY, APPELLANT.

ON APPEAL from the First Judicial District, Hon. RICHARD RISING presiding.

B. C. Whitman, for Appellant.

Crittenden & Sunderland, for Respondent.

Virginia and Gold Hill Water Co. v. The Burning Moscow Mining Co.

Opinion by BEATTY, J., BROSNAN, J., concurring.

The only error complained of in this case is that the judgment is for gold coin. It only differs from the case of *B. F. Hastings & Co.* against the same defendant in this, that the judgment is founded on a trial and finding of facts, and not on the consent of defendant. Upon the authority of *B. F. Hastings & Co. v. same defendant*, the judgment in this case is modified so as to strike out all that portion thereof which requires the same to be satisfied in gold coin. The Court below is directed to make said modification.

The appellant will recover its costs in this Court.

THE VIRGINIA & GOLD HILL WATER CO., RESPONDENT, v.
THE BURNING MOSCOW MINING CO., APPELLANT.

ON APPEAL from the First Judicial District Court, Hon. RICHARD RISING presiding.

B. C. Whitman, for Appellant.

Crittenden & Sunderland, for Respondent.

Opinion by BEATTY, J., BROSNAN, J., concurring.

The judgment in this case will be modified, on the authority of *B. F. Hastings & Co. v. same defendant*, and *J. C. Clark v. same defendant*.

The Court below will modify the judgment by striking out all that part thereof which requires the same to be paid or satisfied in gold coin.

The appellant will recover its costs in this Court.

Gillig & Mott v. Burning Moscow M. Co. Gillig v. Burning Moscow M. Co.

JOHN GILLIG & E. B. MOTT, RESPONDENTS, v. THE BURNING MOSCOW MINING CO., APPELLANT.

APPEALED from First District Court, Hon. RICHARD RISING presiding.

B. C. Whitman, for Appellant.

Crittenden & Sunderland, for Respondent.

Opinion by BEATTY, J., BROSNAN, J., concurring.

The judgment in this case will be modified on the authority of *B. F. Hastings & Co. v. same defendant*, and *J. C. Clark v. same defendant*.

The Court below will modify the judgment by striking out all that part thereof which requires the same to be paid or satisfied in gold coin.

The appellant will recover its costs in this Court.

JOHN GILLIG, RESPONDENT, v. THE BURNING MOSCOW MINING CO., APPELLANT.

ON APPEAL from the First Judicial District, Hon. RICHARD RISING presiding.

B. C. Whitman, for Appellant.

Crittenden & Sunderland, for Respondent.

Opinion by BEATTY, J., BROSNAN, J., concurring.

The judgment in this case will be modified on the authority of *B. F. Hastings & Co. v. same defendant*, and *J. C. Clark v. same defendant*.

The Court below will modify the judgment by striking out all that part thereof which requires the same to be paid or satisfied in gold coin.

The appellant will recover its costs in this Court.

Hastings v. The Burning Moscow G. and S. M. Co.

**B. F. HASTINGS & CO., RESPONDENTS, v. THE BURNING
MOSCOW G. & S. M. CO., APPELLANT.**

Whether this Court, on reversing a judgment, may also order a sale under execution to be set aside.

Section 283 of Practice Act of 1861, and Section 8 of the Act of 1864-5, in relation to Courts of Justice, commented on.

Even if the Supreme Court on appeal from a judgment might order an execution and sale made before appeal to be set aside, yet it is clear that the District Court after case reversed has concurrent jurisdiction to do the same thing. It is the proper practice after a judgment has been reversed in this Court, to move in the Court below, when these facts justify such proceedings, to set aside a sale made on execution under an erroneous judgment.

Sales under a *void judgment* are a nullity. But sales under a judgment merely erroneous are good, and pass the title to the property sold.

Whilst the mere reversal of a judgment will not invalidate a sale regularly made, there is no doubt Courts may, under proper circumstances, (when the rights of innocent parties are not thereby injuriously affected) set aside such sales.

A judgment for so much money to be paid in gold coin is not void. The judgment is valid, but the clause requiring it to be paid in coin is invalid.

All parties are bound to notice the invalidity of the latter clause.

Sales made under erroneous judgments will be set aside as far as can be done without injury to third parties.

When a judgment is reversed, the parties should as near as possible be restored to the condition they were in before error was committed.

A third party purchasing at a judicial sale, and paying his money, ought as a matter of policy to be protected.

When the judgment is merely modified, and the plaintiff has been the purchaser of property, it may or may not be necessary or proper to set aside a previous sale.

The sale in this case should be set aside: first, because there was an irregularity in the judgment which all parties were bound to notice; and second, the plaintiff being the purchaser, the setting of the sale aside only replaces the parties in the position they occupied before error committed.

Quere? If a Sheriff advertises to sell property for gold only, can a stranger to the proceedings, who only connects himself with the sale by bidding, compel the Sheriff to receive paper?

Even if a stranger could do so, he would not bid full value for the property, knowing he must have a lawsuit before he could compel the Sheriff to take the paper.

APPEAL from the District Court of the First Judicial District,
Hon. RICHARD RISING presiding.

The facts are stated in the Opinion.

Hastings v. The Burning Moscow G. and S. M. Co.

Thos. H. Williams, and *B. C. Whitman*, for Appellants, made the following points:

The District Court having control of its own process, had jurisdiction to entertain and grant this motion. (8 Cal. 134; 14 *ibid.* 158, *ibid.* 177; 16 *ibid.* 202, Nash. Dig. Ohio, pp. 285, 286; paragraphs 2-5; 4 Scam. 374; 14 Cal. 667.)

Execution sales made under an irregular judgment which has been modified or revised, will be set aside. (1 Tidd's Prac. 561-2; 14 Cal. 667.)

Where the plaintiff becomes the purchaser, he takes with notice of all irregularities. (3d J. J. Marshall, p. 213; 14 Cal. 667, and authorities there cited.)

A sale for more than authorized by the judgment will be set aside. (4 Dana, 99; 1 Nev. 613.) Therefore, a sale for *something*, or a *thing* not authorized by law, should meet the same fate.

A sale contrary to the terms of the execution, should be set aside. (3 Monroe, 342.)

Variation between the execution and the judgment, avoids the former. (6 J. J. Marshall, 514.)

An irregular execution may excuse the officer, but not the party causing it to be issued. (4 Littell, Ky. 308; 7 J. J. Marshall, 149.)

Upon the point of the direct injury to the defendant by the sale, the record shows that the difference between the judgment at the end of six months from the day of sale, and the sum necessary to redeem from the sale, is \$1,357.85, against the defendant, the Moscow Co.

Crittenden & Sunderland for Respondents, made the following points:

The District Court had no jurisdiction to make the order applied for; that is a subject over which this Court has exclusive jurisdiction. (Acts of 1861, p. 363, Sec. 283.)

Acts of 1864-5, p. 111, Sec. 8.

An order of restitution could have gone from this Court with the remittitur. Not having then been made, it is now too late.

No injury was done to defendants; any bidder could compel the

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Sheriff to take paper, so the defendant or a subsequent lien holder, may redeem in paper. (*Milliken v. Sloat*, 1st Nevada Reports.)

Where a sale has been made under a judgment not absolutely void, but subsequently reversed, the sale is not affected by the reversal, as a general rule, even where the judgment creditor is the purchaser. (*Woodcock v. Bennett*, 1 Cow. 711; *Bank of Ky. v. Van Meter*, 10 B. Monroe, 66; *Benningfield, v. Reed*, 8 B. Monroe, 102; *Reardon v. Lancy*, 2 Bibb, 202; *Brown v. Coombs*, 7 B. Monroe, 318; *Parker's Heirs v. Anderson's Heirs*, 5 Monroe, 451.)

The case of *Hastings v. Johnson*, 1st Nevada, is not in conflict with this proposition, and was correctly decided upon the above authorities. It was a case in which the *execution* varied from the judgment, and was not warranted by it.

The execution was void, and the sale was void, for it rested on *no* judgment.

The judgment in this case was not void, but, at the most, simply erroneous.

The Court had jurisdiction of the parties and the subject matter, and whatever its action, it could therefore only be irregular or erroneous, not void. (*Haynes v. Meeks*, 10 Cal. 110; *Grignon's Lessee v. Astor*, 2d Howard 319; *Reynolds v. Harris*, 14 Cal. 667.)

In *Reynolds v. Harris*, 14 Cal., it was decided that a sale made under an erroneous decree of foreclosure (the purchase having been made by the plaintiff) should be set aside; but the case is very distinguishable from the present case, and does not settle the principle to be applied here.

Fourth—There is a distinction between the cases on erroneous judgments and those on irregular executions. (See 1st Conn. 711.)

Opinion by BEATTY, J., BROSNAN, J., concurring.

This cause comes before us under the following circumstances: In the year 1865, plaintiff obtained judgment against defendant for something over twenty-eight thousand dollars. The judgment directed the same to be made in gold coin. Execution issued, and

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defendant's property was levied on and sold. The execution directed the amount to be paid in gold coin; the advertisement stated the sale would be for gold coin, and the Sheriff, when the sale was made, announced it would be for gold. When the sale was made, one of the plaintiffs bid the amount of their judgment, including interest, costs, etc., for the property. There being no other bid, the Sheriff gave a certificate of purchase to the plaintiffs, who bid the amount of the debt. Whilst the bid was by only one plaintiff, it is admitted the same was made for the benefit of all the plaintiffs. Subsequent to the sale under execution, defendant appealed from that part of the judgment which required the debt to be made in gold coin. Upon that appeal, this Court directed the judgment to be so modified as to strike out all portions thereof directing the same to be paid or collected in gold coin.

After this modification was made, the defendant moved the Court below to set aside the execution which had been issued directing the collecting of the judgment in gold coin, and also the sale made thereunder. The Court refused to sustain this motion, and the defendant appeals to this Court.

The appellant makes two points. First—That the District Court had jurisdiction to set aside the sale made under an irregular judgment. Second—That when the plaintiff purchases under an irregular judgment, he must be deemed to be cognizant of that irregularity, and the execution and sale will be set aside. Upon the first point, respondents contend that the District Court has no jurisdiction; that jurisdiction of this entire subject has been given by statute to this Court. In support of this proposition, respondents refer to the 283d section of the Practice Act of 1861, and the eighth section of the Act of 1864–5, in relation to Courts of Justice, which are as follows: "Upon an appeal from a judgment or order, the appellate Court may reverse, affirm, or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties; and may set aside, or confirm, or modify any or all of the proceedings subsequent to or dependent upon such judgment or order; and may, if necessary and proper, order a re-hearing. When the judgment or order is reversed or modified, the appellate Court may make complete restitution of all property and rights lost by the erroneous judgment or order; and

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when it appears to the appellate Court that the appeal was made for delay, it may add to the costs such damages as may be just."

"SEC. 8. This Court may reverse, affirm, or modify the judgment or order appealed from, as to any or all of the parties; and may, if necessary, order a new trial, or the place of trial to be changed. When the judgment or order appealed from is reversed or modified, this Court may make, or direct the inferior Court to make, complete restitution of all property and rights lost by the erroneous judgment or order."

The language of the 283d section of the Act of 1861, is certainly broad enough to confer on this Court power to set aside a sale under execution, made in any case which is reversed in this Court. The other section (section eight of the Act 1864-5) we think does not by its terms embrace a proceeding of this kind. It was probably intended merely to embrace those cases where specific, real, or personal property was transferred from one party to the possession of another, by the judgment or special order of the Court, and not to those cases where there was a sale made under an ordinary money judgment.

Whether the section in the Act of 1864-5 does or does not supersede that in the Act of 1861, may be somewhat questionable.

But we deem it unnecessary to decide this point. Even if this Court has power under the Act of 1861 to make an order setting aside an execution and sale made under an erroneous judgment, we are clearly of opinion the District Court has a concurrent jurisdiction with this Court to afford the like remedy. And we deem it the best and most regular practice to make such motion in the District Court.

Generally, to sustain such motion, many facts must be shown which would not be shown by the Transcript of the record used on appeal from the judgment.

It would be an absurd practice to burthen the Transcript sent to this Court with extraneous matter, only to be used on motion to set aside executions, sales, etc., after the reversal of the judgment.

The proper practice is, where a case has been reversed in this Court, to move the Court below to set aside any proceedings inter-

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mediate the judgment and reversal, which have been prejudicial to the applicant.

How far the Court below can or ought to afford relief, will depend on circumstances.

Sales made under executions issued upon void judgments, are void and of no effect, except in so far as they may operate as a cloud on the title, and become the source of annoyance and litigation to the party whose property has been sold.

On the other hand, sales under executions regularly issued on judgments, which are erroneous but not void, are valid sales, and pass the title of the property sold. The mere fact that the judgment is afterwards reversed will not invalidate the sale.

But whilst the reversal will not of itself invalidate the sale, there is no doubt but that Courts may and will set aside sales made under erroneous judgments, when reason and justice require it should be done, and the rights of innocent parties will not be injuriously affected thereby.

This case presents some peculiarities not to be found in any of the cases to which the Court is referred.

The judgment itself was not void, but a valid and subsisting judgment for so much money. To that judgment was added a clause requiring it to be made in gold coin. This Court held in the case of *Milliken Brothers vs. Sloat* that such a clause is altogether invalid and of no effect. That a defendant, notwithstanding such clause, might still pay the judgment in legal tender notes before the same was reversed or modified. We, as yet, see no reason to change our opinion in this respect.

If we are correct in that opinion, then this part of the judgment is something more than erroneous. It is absolutely void, and all persons would be bound to take notice that such a judgment could not be rendered by the Court.

If an execution follows a judgment which the Court could not under any state of facts lawfully render, all parties would be bound to notice the illegality of the judgment, and could not, we think, be held as innocent purchasers under such execution, unless the result of a sale thereunder would be precisely the same as under an execution upon a regular judgment. Whether the advertisement and proclamation of a Sheriff that he will only sell for gold

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coin, can operate injuriously to a defendant in execution, we will notice presently.

Whilst, as we have before stated, sales under erroneous judgments are clearly not void, it has been an established practice, (and such practice was settled upon the most obvious principles of justice and common sense) after a reversal of a judgment to set aside sales and proceedings thereunder, so far as it can be done without injuriously affecting the rights of third parties.

After a judgment has been reversed, the Court should, if possible, restore the parties to the same situation they occupied before the error was committed. If the plaintiff buys the property under an execution sale, made by virtue of an erroneous judgment, and still holds the property at the time the motion is made to set aside the sale, we can see no possible reason why it should not be done. If the purchase is made by a stranger, who has no reason to believe the judgment erroneous, both justice and the policy of the law require that the sale should be sustained.

The party having paid his money under a judicial sale should not be deprived of his property and turned over to a doubtful action against the plaintiff for the recovery back of the price paid. Such a course would be unjust and against sound policy; it would prevent all bids at judicial sales.

When a judgment is modified, or only partially reversed, it might or might not be proper to set aside a sale when the plaintiff was the purchaser. If a judgment were rendered for \$10,000, and defendant's property were sold for \$8,000, the plaintiff being the bidder, and the judgment was afterwards modified so as to reduce it to \$9,000, this would be no ground for setting aside the sale: for the judgment would still stand good for an amount sufficient to more than cover the property sold. But if it should be so modified as to reduce it to \$7,000, there would be good grounds for setting aside the sale.

We think in this case there were two sufficient reasons for setting aside the sale. First, because the judgment and execution were both irregular, in a matter of which all persons were bound to take notice. Second, because the plaintiffs being the purchasers and holders of the property sold, the setting aside of the sale will

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restore the parties to the position they occupied before the error or irregularity spoken of was committed.

It is said, however, by respondent, that no injury was done by this mode of sale, because any one might have bid at the sale so many dollars and compelled the Sheriff afterwards, by proper proceedings, to take the legal tender notes. This proposition is not entirely clear in our minds. There is no question that an individual may sell his property either at private sale or auction only for gold coin. If there is no credit on such sales there is no *debt*, and the Act of Congress in regard to legal tenders has no application.

If an individual may sell for gold coin only, we cannot see that the Sheriff could be compelled by a stranger to the execution to sell for money generally. It is true, he could be compelled so to sell by the defendant in execution. But if the terms of an auction sale are for gold on delivery of property or certificate of sale, we doubt whether a mere purchaser could compel the officer to take paper. But if he could, such a sale would still be injurious to the defendant in execution. No person would bid as much for property, with the expectation of having a lawsuit to compel the Sheriff to take paper money, as he would if he knew that such money would be received without question. We are of opinion the mode of sale was illegal, and injurious to the interests of defendant, and should have been set aside.

The order of the Court refusing to set aside the execution and sale are reversed.

The Court below will enter an order setting aside the execution and sale, and make all necessary orders to set aside, cancel and amend the proceedings under said execution and sale.

W. J. & A. R. SHOLES, RESPONDENTS, v. STEAD & HUNT,
APPELLANTS.

A judgment for gold coin is erroneous.

The cost bill was filed within two days after "the decision of the Court."

APPEAL from the First Judicial District, Hon. CALEB BURBANK presiding.

Sholes v. Stead & Hunt.

The facts are stated in the Opinion.

Campbell & Seely, for Appellant.

Mitchell & Hundley, for Respondents.

Opinion by BEATTY, J., BROSNAN, J., concurring.

This is a judgment for six hundred and ninety-nine dollars and forty-six cents, besides one hundred and nine dollars and ninety-five cents costs, made payable in gold coin.

There are two assignments of error: one, that the judgment is for gold coin; the other, that the judgment, so far as it relates to costs, is erroneous for the reason that no cost bill was filed within two days after the decision, as required by law.

This Court has repeatedly held that a judgment for gold coin cannot be sustained.

In regard to the second point, these are the facts:

The cause was tried before the Judge on the eighth day of December, 1865. At the conclusion of the argument, the Judge made an order reciting the submission, argument, etc., and concluding as follows:

"Judgment ordered to be entered in accordance with the findings of Court."

On the following day, (the 9th) findings which were in favor of plaintiff, were filed.

On the eleventh, the cost bill was filed. The statute says: "The party in whose favor the judgment is rendered, and who claims his costs, shall deliver to the Clerk of the Court, within two days after the verdict or decision of the Court, a memorandum of the items of his costs," etc., etc. The only question is, what is the date of the "decision of the Court?" Was it the eighth, when the first order was made, or the ninth, when the finding of facts was filed? We think, most decidedly, when the finding of facts was filed. The first order does not even intimate in whose favor the judgment would finally be. There might have been a finding of facts requiring the judgment to be for defendant. It is quite possible the Judge may have stated how the findings would be, but the record shows nothing of the kind. In the absence of record

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evidence, this Court cannot say the case was decided before the ninth.

The Court below will so modify the judgment as to strike out all that part thereof which relates to gold coin. In other respects the judgment is affirmed. The appellants will recover their costs in this Court.

THOMAS McDONALD, RESPONDENT, v. PRESCOTT & CLARK, APPELLANTS.

The mere recital in a transcript from a Justice's docket that defendant was *duly served* is not sufficient. Before the transcript can be admitted to establish the rights of one holding under the judgment of a Justice, the facts in regard to the service of summons must appear.

It may be proved in a collateral proceeding that certain property was not actually sold by a constable at a judicial sale, notwithstanding the constable's certificate of sale.

An answer in which an officer attempts to justify a seizure under execution should not only set out the execution, but also the judgment on which the execution is founded, and show distinctly that defendant is an officer properly acting under such execution.

An officer may justify in some cases under an execution alone. But under other circumstances, as when the controversy is with a purchaser whose title is only defective for want of a delivery, the officer must show the judgment as well as the execution.

APPEAL from the District Court of the Sixth Judicial District, Hon. E. F. DUNNE presiding.

McRae & Rhodes, for Appellants, made the following points :

The testimony that the constable's return was false should have been admitted. (*Baker v. McDuffie*, 23 Wend. 289 ; *Crocker on Sheriffs*, p. 27, Sec. 45 ; *Phil. on Ev., Cow. & Hd.* 2 Pt., p. 296 ; *Dubois v. Dubois*, 2 Wend. 418, 3 Monroe, 349 ; *Herron v. Hughes*, 25 Cal. 563.)

The return may be attached even between the parties when the whole proceedings are void. (2 Cow & H. ¶ Notes to *Phil. on Ev.*, p. 799, 8 Green. 207.)

The judgment of the Justice of the Peace was fatally defective, no summons or service having been shown on the defendant.

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The law presumes nothing in favor of Courts of limited jurisdiction. But he who asserts a right under a judgment rendered by them must affirmatively show it. (*Swain v. Mount & Chase*, 12 Cal. 285 ; *Rowley v. Howard*, 23 Cal. 401.)

The recital on a Justice's docket that process was duly served is not evidence of the fact so stated. The summons and return must be shown. (*Lowe v. Alexander*, 15 Cal. 296 ; *Mallett v. Uncle Sam*, 1 Nevada R. 188.)

No brief on file for Respondent.

Opinion by BEATTY, J., full Bench concurring.

This was an action instituted to recover certain personal property. Plaintiff alleges that prior to and on the tenth of October, 1865, he was the owner of and in the possession of certain chattels ; that on that day they were taken out of his possession by defendants.

Defendants for answer first deny that plaintiff was the owner of the goods sued for on the day stated, or on any other day ; secondly, defendants aver the goods in controversy were the property of the Sheba Company, and justify the taking under an execution sued out from the District Court of Humboldt County against said company ; thirdly, defendants say if plaintiff ever had any possession of the chattels in dispute, it was obtained by fraud and collusion. Then follow certain averments setting out the particulars of the alleged fraud, showing that plaintiff's only claim to the property was under a sale, or a pretended sale, made by a constable, in pursuance of certain alleged fraudulent schemes ; and winding up with an allegation that the property in dispute was not sold by the constable, but that he made a false and fraudulent certificate of purchase to plaintiff, including this property, and that the property was never delivered to plaintiff, but remained in possession of the Sheba Company.

The plaintiff moved to strike out all that part of the answer which relates to the alleged fraudulent doings of plaintiff, the constable, etc. This motion was sustained, and the parties then went to trial.

The plaintiff, to prove his right to the property, introduced a

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judgment entered by a Justice of the Peace in Star Township, in favor of *Edward Jones v. Sheba Company*; the execution issued thereon; the return of the officers on the execution; and the officer's certificate of sale, showing a sale to himself of the property now in dispute.

The defendants objected to this testimony, on the ground that there was nothing in the transcript from the Justice's docket showing that the Sheba Company had ever been served with summons, or that the Justice had jurisdiction of the case. This objection we think well taken.

There is a recital in the transcript from the Justice's docket to this effect: "Summons issued, returnable August 17th, A.D. 1865, at 11½ o'clock A.M. August 15th, 1865." "Summons in the above case duly served, returned, and filed, August 17th, 1865, 12½ o'clock A.M."

Nothing is presumed in favor of the jurisdiction of Courts of limited jurisdiction. The recital that the summons was duly served, without stating the facts as to how, when, or where it was served, is not sufficient. It is merely the opinion of the Justice that the service was sufficient. Possibly a Court of superior jurisdiction might, if the facts were before it, hold otherwise.

There was no appearance of the Sheba Company. Default was taken against that company.

We cannot, under such circumstances, presume the Justice had jurisdiction. (See *Lowe v. Alexander*, 15 Cal. 296.)

The summons and return thereon should have been produced with the transcript, to show jurisdiction. It was error to admit the evidence as offered.

Defendants also offered to show that the constable did not sell the property in dispute at the constable's sale, although the certificate of sale stated that he had sold this property to plaintiff.

The Court ruled this evidence out, on the ground that the defendants could not attack the constable's sale collaterally.

As we understand the offer, it was to prove the constable never did offer this particular property for sale. This was legitimate evidence. Supposing the constable's sale to have been a regular one on a valid judgment, plaintiff only got title to the property really sold to him by the officer. The constable's certificate could

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not make a title to plaintiff for property that he never sold him. We know of no rule of law which would estop a party from inquiring whether such certificate contains the truth or a falsehood. It was error to refuse to admit this evidence. In this case it was a pertinent inquiry as to whether the property really was sold by the constable, or whether it was through fraud, ignorance, or mistake inserted in the certificate as having been sold, when in reality it never was.

We are inclined to the opinion that the Court erred in striking out a part of the defendants' answer. The answer, however, is rather defective, and we would suggest an amendment before this case is re-tried. The answer would have been more perfect if, in addition to the execution, it had alleged a good and subsisting judgment against the Sheba Company. It fails, also, to show that defendants, or either of them, was an officer.

An execution, regular on its face, will sometimes justify the officer; but when an officer levies on the property which has been sold by the defendant in execution, in such a way as to make the sale good as between him and his vendee, but not good against creditors, (as, for instance, where there has been a *bona fide* sale, but no delivery) the officer must show not only an execution, but a judgment.

The judgment is reversed, and remanded for further proceedings, with leave to defendants, if they desire it, to amend their answer.

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JOHN O'MEARA, RESPONDENT, v. THE NORTH AMERICAN MINING CO., APPELLANT.

The true measure of damages in an action of trover, is the value of the article when converted, with interest on that value to the time of trial. Per BEATTY, J.

This rule should have this modification, if there is an actual conversion at one time not known to plaintiff and he afterwards demands his property and is refused, he may treat this conversion as only having taken place when he demanded the property. Per BEATTY, J.

In this cause the prayer of the bill is for stock, and if that cannot be had, then an alternative decree for its value. In such a case the measure of damages is the value of the stock when the decree is rendered.

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The proof offered as preliminary to the admission of a certified copy of a deed was not sufficient to comply with established rules of law. But the defect was merely technical and could have been supplied. It is a better practice in a Court of Chancery to allow such defects to be cured, than to deprive parties of their substantial rights for a mere technical error or omission. Per BEATTY, J.

Courts of Equity should, in all cases, allow reasonable delay and indulgence to defendants to establish their rights. Per BEATTY, J.

The Court did not use a wise discretion in rejecting this deed without further inquiry. Per BEATTY, J.

A party executing a deed cannot avoid it because he spells his name wrong in attaching his signature to it.

When one deeds all his interest, say one hundred and thirty-seven and one-half feet, in a mining company to Trustees, to form a corporation, in trust that he is to receive shares in the corporation in lieu of the feet, and afterwards conveys the same feet with covenants of warrantee to another party, the last grantee takes an equity and is entitled to the shares to be issued in lieu of these feet.

When Trustees of a mining company issue stock to the party equitably entitled, the Court will not compel them to issue to another, especially when that other can only show his claim by establishing his own fraud.

Per LEWIS, C. J. I concur in the measure of damages established in this case, but am not satisfied as to the general rule mentioned in the opinion.

I do not think defendant laid the proper foundation for admitting the copy of the first deed offered in evidence.

APPEAL from the First Judicial District, Storey County, Hon. RICHARD S. MESICK presiding.

The facts, so far as they relate to points decided, are fully stated in the Opinion.

Hillyer & Whitman, for Appellants, made the following points as to those matters that are passed on in the Opinion of the Court:

First—The Court adopted an erroneous rule in estimating damages.

There being no proof before the Court of the value of stock at the time of trial, there was no basis for a judgment. (*Smith v. North American Co.*, 1 Nevada, 442.)

Second—The judgment for damages could only be alternative, on failure to deliver stock. (*Id.*)

Third—The Court erred in refusing to admit the deeds to Pettybridge, Apple, Van Vleit and Harris, as they afforded preliminary proof which, taken in connection with other evidence, went to show

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that defendant had issued all its stock to the parties properly entitled to receive it.

Fourth—The Court erred in rejecting the copies of deeds. Sufficient predicate had been laid for their introduction.

Taylor & Campbell and Isaac Atwater, for Respondents, made the following points:

I. It appearing from the answer of defendant that it had no stock which it could issue to plaintiff, he was entitled to recover the value of the shares. (*Pollok v. National Bank*, 3 Seld. 274.)

II. The true rule of damages is the full value of the stock at its highest price, between the time of the refusal to issue certificates and the time of the commencement of this action. (*Angel & Ames on Corp.* § 565; *Kortwright v. Buffalo Bank*, 20 Wend. 91; *Com. Bank of Buffalo v. Kortwright*, 22 Wend. 366; *West v. Wentworth*, 3 Cow. 82; *Wilson v. Little*, 2 Comst. 449; *Douglas v. Craft*, 9 Cal. 563; *Hart v. Ten Eyck*, 2 Johns. Ch. 116.)

III. There was no error in excluding the deed from O'Meara to Pettybridge; it does not appear to be the deed of the plaintiff, as the name of the grantor is not that of plaintiff, nor is the ground described in the deed the ground in dispute. No proper predicate had been laid for the introduction of the deed. (2 Phil. on Ev. [3d Edition] pp. 229, 233-4 and Note; 4 Id. [Cow. & Hill's Notes] p. 441 and cases cited; *Jackson v. Hasbrouck*, 12 Johns. 191; *Jackson v. Frier*, 16 Johns. 193; *Daw v. Brown*, 4 Cow. 483; *Jackson v. Root*, 18 Johns. 60; *Folsom v. Scott*, 6 Cal. 461; *Norris v. Russell*, 5 Id. 251; 1 Greenl. Ev. § 558.)

IV. The deeds to Harris and Van Vleit were properly excluded. They were executed after plaintiff had conveyed all his interest in the ground to defendant.

Opinion by BEATTY, J.

This was a proceeding in equity to compel the transfer of certain shares of stock to the plaintiff; and if said stock could not be transferred, then asking a decree for compensation and damages, for the failure to transfer the stock.

The plaintiff alleges that he had held five hundred and fifty feet of ground in the North American Mining Co. claim. That he first sold

and assigned three hundred and fifty-two and a half feet of it to individuals, and then conveyed the remainder, one hundred and ninety-seven and a half feet to the trustees of a corporation formed to work said claim. That in consideration of said conveyance he was to have had transferred to him one hundred and ninety-seven and a half shares of stock. But before the deed to the Trustees was recorded, he admits having sold ten feet more of the ground. So he only claims that the Trustees should transfer to him one hundred and eighty-seven and a half shares of stock.

The answer alleges that the plaintiff, before the conveyance to the Trustees, had conveyed to others three hundred and seventy-seven and a half feet, (say twenty-five feet more than plaintiff admits) and after the conveyance to the Trustees, and before they were ready to issue the stock, he had conveyed his interest in one hundred and eighty-two and a half feet to others. This would make more by ten feet than plaintiff ever claimed in the company.

On the trial of the case, the plaintiff proved that he had made a demand for his stock in the latter part of June, 1863; and proved that in the year 1864 this stock was at one time worth two hundred dollars per share, and rested.

The defendant proved conveyances from the plaintiff to the amount of three hundred and eighty-seven and a half feet, which were admitted without objection. The defendant then offered in evidence three other deeds, or rather copies of deeds, from the plaintiff to other persons, for other portions of the same mining ground. These instruments were rejected, and this rejection forms the principal ground of complaint on the part of appellant. The facts in relation to each one of these instruments will be more particularly noticed when we come to consider the assignment of errors.

There are numerous errors assigned by appellants, only two of which it will be necessary to notice, as a determination of these points will probably settle the entire controversy. The first assignment of error is that the Court adopted an erroneous rule in estimating damages.

The plaintiff, if entitled to stock at all, became so entitled about the last of June, 1863.

At that time he demanded his stock, and it was refused. He offered no proof of the value of the stock at the day he demanded

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it, nor at the day of trial. He only offered proof of the highest market value of the stock between the tenth day of June, 1863, and the day of trial. It was proved that, at one time in April, 1864, the stock was worth two hundred dollars per share. And the Court gave judgment in damages for the value of the stock at that price. This was clearly an erroneous basis for the estimation of damages.

In the action of trover, it has been sometimes held that the measure of damages is the highest price of the article converted between the day of conversion and the day of trial. In other cases, between the conversion and the commencement of action.

Whilst it cannot be denied that there are some respectable authorities containing both these propositions, we cannot think they are founded either in reason or justice. We think such propositions contrary to some of the best settled principles of the Common Law.

The theory of all actions for damages is, that the plaintiff sues for those damages which he has already sustained. He could not say in his complaint that he had already sustained certain damage, and expected to sustain other damage before the suit was tried. Nor could he say he had sustained certain damage by the conversion of his property, and subsequently other damage arising from the fact that the particular kind of property converted had risen in value since the conversion.

The action is for converting the property; the utmost limit of damages would be the amount of money it would have taken to replace the property converted. But as the plaintiff has to wait for that money until he recovers it in his action, doubtless it would be just and proper to allow interest from the time of conversion. That the property afterwards rises or falls in value cannot be the subject of legitimate inquiry. If the plaintiff were allowed to show after the conversion the property rose in value, and the conversion deprived him of this profit, it would be proper to allow defendant in rebuttal to show that, if the property had not been converted, plaintiff would have sold, and that not he, but another, would have made the profit. Why not allow the defendant to show that if he had not converted the property, plaintiff would have exchanged it for other property, which afterwards became worthless, and thereby defeat all claim for damages? Such propositions would not, of

course, be listened to with respect by any Court, yet we think they are scarcely less in conflict with the established and settled doctrines of the law than the proposition to allow the plaintiff to prove the temporary speculative value which an article may have had months or years after conversion. We think the true rule of damages in a case of trover is the value of the article when converted, with interest from that time to the time of trial, with perhaps this modification: when there has been an actual conversion at one time, which however is not clearly brought home to the knowledge of the plaintiff, and he subsequently makes a demand for the article, and is refused, he may prove value at the time of the demand and refusal. For although there may have been an actual prior conversion, he is not properly bound by it until he knows it has been converted. As he could not know the actual time of conversion, he ought, as against a wrong-doer, to be allowed to prove the value at the time he first learned he could not obtain his property on demand.

And we are satisfied that some of the ablest Courts of the United States have uniformly held that the measure of damages is to be fixed by the value of the property at the time of conversion. The decisions of the Courts of Massachusetts and Kentucky have, we think, uniformly adopted this rule.

On the other hand, those Courts which have held that the highest price of an article between the time of conversion and trial, or commencement of the action, is the proper criterion of damages, are not uniform or consistent in their rulings. But, whatever may be the rule in a case of trover, there could be no room for doubt in such a proceeding as this.

The plaintiff asks for the stock itself, not for damages. If the Court finds he is entitled to the stock, but defendant cannot transfer the stock, because it has none to transfer, then there can certainly be but one rule or measure of damages: that is to decree as much as would buy the same amount of stock at the time the decree is rendered, for the money comes in lieu of the stock—stock which should be transferred at or after the decree, and it is wholly immaterial what that stock may have been worth at any former period.

The other assignment of error which we shall notice is as to the rejection of certain deeds offered in evidence by defendant and

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rejected by the Court. The first paper offered was a certified copy of a deed from John O'Mara to Pettybridge, dated September, 1860—twenty-five feet of ground in the North American claim. Before offering the certified copy, defendant introduced the following preliminary testimony. L. Hermann testified as follows: "I am Secretary of the defendant; the company has not the custody or control of a deed from plaintiff to P. Pettybridge for any portion of ground of which defendant is in possession. It has not the custody nor control of a deed for any such ground from plaintiff to W. Van Vleit, or W. B. Harris. No such papers are in possession of the company."

B. C. Whitman testified: "I have made search among the papers shown me by L. Hermann, as belonging to the defendant, and cannot find either of the deeds by him referred to."

W. G. Orrick says: "I made search among the papers of J. R. Plunkett, deceased, former Secretary of defendant, for the papers referred to, and could not find them." On cross-examination he said: "I never had search made at the company's office, and no authority to make the search I did."

Robert Apple testified: "I know of a deed from plaintiff to P. Pettybridge for twenty-five feet of North American ground. I bought of Pettybridge, and would not complete the transaction, because the deed was not acknowledged. So I went with the plaintiff to the office of Samuel Arnold, in Gold Hill, and the plaintiff there acknowledged the deed before him. Arnold was a Notary Public; he attached his certificate, and I paid for it after it was acknowledged. Pettybridge made transfer on the same paper to me, and acknowledged it before the same Notary. This occurred some time in the spring of 1863. I have not the deed now. I gave it to defendant."

Then a copy of the deed, duly certified by the Recorder of Storey County to be a copy taken from his records, which also contained the Notary's certificate, the certificate of the former Recorder of recordation of the instrument, etc., etc., all in due form, was offered in evidence. The plaintiff objected to its introduction, because there was no proof of the existence of the original, nor of its loss or destruction, and because it did not purport to be the deed of the plaintiff.

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That there was such an instrument, was positively proved by Robert Apple. That the instrument was lost or destroyed, it is true, was not proven. Nor is any such proof necessary in regard to recorded instruments. All the statute requires as preliminary to the introduction of a certified copy of a recorded deed is to show either that it is lost or *that the party wishing to use it has it not in his power*. Here L. Hermann swears the company had not the *custody or control* of the paper. This is some proof, certainly, of the only material fact to be established. But it is very unsatisfactory. Witness does not state how he obtained his knowledge that the company had not the custody of the paper. He does not say he was the custodian of the papers of the company. He does not show that he made any search for the original. Indeed, he shows no circumstance which would entitle him to make the positive assertion he does make.

Ordinarily, we should have thought very little testimony on this head was necessary, because it was not to be supposed that the company would be custodian of a deed from O'Meara to Pettybridge. Naturally we would suppose that deed to be in the possession of the grantee; and, perhaps, under ordinary circumstances, if the Secretary had simply said he was the custodian of the company's papers, and did not know of the whereabouts of the deed—that it had never been in the possession of the company that he knew of—this would have been sufficient. But in this case, Robert Apple proves that he delivered the deed to the company, and it having been once in possession of the company, they should have produced the deed, shown that it subsequently passed out of their possession, or that they had made an honest attempt to find it. If the evidence is fully reported, defendant does not show that any *bona fide* search was made for it. Mr. Whitman searched the papers handed to him by the Secretary, but the Secretary does not show he handed him all the papers. The proof was very meagre; yet we hardly think the deed should have been finally rejected even on this proof.

It was a matter addressed to the discretion of the Judge. The Secretary of a company is usually the custodian of the papers of the company. If the Judge was not fully satisfied in this case that the Secretary was the custodian of all the papers of the company, it would certainly have been better to inquire on that point

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than reject a paper which was so essential to the defense. It appears, too, that the Secretary who formerly had charge of the papers of the company was dead, and that the present Secretary came into office after this deed was delivered to the company. That being the case, he may not have been aware that the company ever had the deed, and therefore felt the less necessity for looking for it. It would most certainly have been more satisfactory if proper inquiries had been made on this subject; and if proper search had not already been made, time might have been given to the Secretary to make such search. This could have been done without inconvenience or delay, as there was no jury in the case. The deed was a recorded instrument; the public usually look to the records without inquiring about the original. There is scarcely a probability that any material error could have occurred in the copying. Here there was proof outside the record that the plaintiff did execute the deed. There was no real doubt as to plaintiff having executed such a deed. We can hardly conceive that a Court of Equity is performing its legitimate duty when under such circumstances it rejects a deed which is essential to the defense, and gives judgment against a defendant for a large sum of money, not because the presiding Judge is convinced defendant ought to pay it, but because defendant has committed some technical error in making its defense.

If a complainant goes to trial in a Court of Equity and fails to make out a case justifying a decree in his favor, yet showing that he probably has an equity which he might make out at another time, his bill is dismissed without prejudice, thus allowing time to begin anew, and not cutting him off from all chance of obtaining his just rights. So if a defendant evidently and beyond all reasonable doubts has a good defense, the Court should grant some delay and give some indulgence to enable him to make out that defense according to the prescribed forms of law. Courts of Equity are instituted to do justice, and not to play at games of chance or skill. Again, in this case, the objection raised to the admission of the deed was, that the loss of the deed was not properly shown. Nothing of the kind had to be shown. Had the point been properly made—that defendant had failed to show the original was not in its power—perhaps a further examination of Hermann might have removed the difficulty.

We do not think the Court made a wise and prudent use of its discretionary powers in rejecting the deed without further inquiry.

The other objection to this deed we can hardly treat seriously. The signature to the deed is spelled *O'Mara*. The plaintiff in his complaint spells his name *O'Meara*, the Notary in the certificate spells it *O'Mera*. Here we have three spellings of the name. But any English scholar knows that *a*, *ea* and *e* have in many words the same sound. Especially is it so in proper names and in many foreign words. Both *e* and *ea* frequently have the same sound as *a* in fame and many other English words. Then even according to the strictest rules of pleading these names would be considered and treated as the same. They are *idem sonans*. But how are we to know what is the proper spelling of plaintiff's name? It is proved that he acknowledged the signature of *John O'Mara* as his signature. He acknowledged this particular deed as his deed. Can he avoid his own deed by getting a lawyer to spell his name wrong in a complaint filed? If one of these spellings is right and the other wrong, from all the proof before this Court it must be presumed that *O'Mara* was right, for that was the signature plaintiff acknowledged, and *O'Meara* is wrong, for we have no further proof of the correctness of this spelling than that we find it in the complaint. We think it is hardly to be presumed that a lawyer always spells his client's name right, especially when his client spells it differently.

But it is in reality a matter of no importance which spelled the name right, or whether either of them spelled it right. A party can neither avoid his deed by omitting one letter of his name when he attaches his signature to it, nor by employing a lawyer to add an extra letter to the spelling when he files a complaint. The question here was, did the plaintiff—the man prosecuting this suit—make the deed offered in evidence. The proof was positive that he did acknowledge having made it, and that was sufficient reason for admitting it, without any inquiry as to the proper spelling of his name.

The next paper offered in evidence was a certified copy of a deed from John O'Meara to W. B. Harris, dated June 11th, 1863. This was objected to as incompetent and irrelevant testimony; only on the ground that it was made after plaintiff had conveyed all his interest in the mining ground to the Trustees of the defendant. The

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deed is for an interest of one hundred and thirty-seven and a half feet in the North American claim. It is very full, and purports to carry not only the one hundred and thirty-seven and a half feet, but any and all equities plaintiff may have had in that many feet in the North American Company's claim. It also contains a full warrantee deed that said one hundred and thirty-seven and a half feet are clear and free from all incumbrances, sales or mortgages made by plaintiff.

At the time this deed was made, plaintiff had conveyed the legal title to all his feet or undivided interest in the mine to the Trustees of the corporation. But he certainly had an equity in those feet. He was entitled to one hundred and thirty-seven and a half shares of stock in lieu of the feet. There can be no doubt but it was the intention of the grantor to convey that equity. The language used sufficiently expresses that intention, although the words shares and stock do not appear in the deed.

But where the intention of a party is sufficiently apparent, a Court of Equity will carry out that intention, even if the most appropriate language is not used to express what was meant. The proof shows here that plaintiff had just one hundred and thirty-seven and a half feet of ground undisposed of when he deeded to the Trustees of the corporation, and that he was entitled to just one hundred and thirty-seven and a half shares of stock in lieu of those one hundred and thirty-seven and a half feet. What did he mean by making this deed? Either one of two things: to deed and transfer to Harris his right to demand the one hundred and thirty-seven and a half shares, or else to swindle Harris by deeding to him ground or feet which he had already deeded to others. In either event Harris was entitled to the stock. A mere verbal order to the Trustees to deliver certificates of the stock to Harris would have been sufficient. If this deed was intended as a written transfer of O'Meara's right to the stock, as we think it clearly was, it is certainly sufficient. If, on the contrary, the deed was intended as a mere fraud, and a trick to get Harris' money for nothing, a Court of Equity would not hesitate to give Harris the stock, in lieu of the mining ground which by the terms of the deed he was to have.

If the company issued the stock to Harris, who was equitably

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entitled to it, the Court would not grant its aid to the plaintiff to recover the same stock from the company. A party will not be allowed in a Court of Equity to establish a claim by showing his own fraud and deceit.

We cannot, of course, know what might be brought out on a future trial of this case, and can only reverse the judgment and send it back for further hearing ; but unless some new facts can be made to appear, different from those disclosed in this transcript, we can but express the hope that plaintiff will dismiss the case, and not again place himself in so unenviable a position as the evidence in this record has placed him. Judgment reversed, and cause remanded for further proceedings.

Opinion by LEWIS, C. J.

I concur in the judgment of reversal in this case, but as to the rule of damage adopted, I do not wish to be understood as sanctioning it as a general rule. In cases of this character it is undoubtedly correct. I am not, however, prepared to say that in some other form of action the highest value of the stock between the time of conversion and that of trial would not be the proper measure of damage.

I am also of opinion that the defendant did not establish a proper foundation for the admission of a copy of the deed from the plaintiff to Pettybridge, and therefore that the Court below ruled correctly in excluding it. But as to the exclusion of the deed from O'Meara to Harris, I fully concur in the views expressed by Justice Beatty.

RESPONSE TO PETITION FOR RE-HEARING.

Ordinarily the measure of damages in trover is the value of the article when converted, together with interest thereon, subject however to some qualifications.

The market value at time of conversion, and interest, will not in all cases be compensation to the plaintiff.

The true rule seems to be, the value of the article when converted, together with such additional damages as shall cover not only every additional loss which the plaintiff has sustained, but any additional value which the wrongdoer has obtained, or has it in his power to obtain.

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The highest market value between the conversion and trial is not the rule, unless it be shown that but for the conversion the plaintiff would have realized that price.

Where the proceeding is in equity to compel the delivery of stock, and the defendant is unable to deliver it, the alternative decree should be for the value of the stock at the time of the trial.

The defense here was equally good, whether the defendant had delivered, or was only bound to deliver the stock to a third party. If another party was entitled to the stock, plaintiff could not be so entitled.

Opinion by LEWIS, C. J., BEATTY, J., concurring.

In their petition for re-hearing in this case, counsel for respondent claim that this Court erred in the rule of damage adopted by it in its former opinion. I was not at that time prepared to sanction the general rule as stated by Justice Beatty; but after a thorough examination of the authorities, I am convinced that with some qualifications it is the correct rule in trover.

It was stated in that opinion that the general rule of damage in an action for the unlawful conversion of personal property, is the value of the property at the time of conversion, with legal interest thereon from the time of such conversion.

It is manifest, however, that this rule would not in all cases afford the owner such indemnity as in justice he might be entitled to; and in some cases under it the wrongdoer might make a profit by his unlawful act, which I think is repugnant to the general spirit of the law. The first object of the law in actions for wrongful conversion or detention for personal property should be to place the owner in as favorable condition as if he had not been deprived of his property, or to give him ample and full indemnity for its loss; and it should be no less an object to deprive the wrongdoer of any profit which he may have derived, or which he has it in his power to realize from his own wrong.

The rule, therefore, which seems to me most consonant to justice, and most in harmony with the spirit of the law, is, that the owner of the property wrongfully converted or detained shall receive as a measure of damage the market value of the article at the time of the conversion, together with any damage which he is proven to have sustained from the loss of its possession. It is clear that the addition of legal interest to the market value of the prop-

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erty will not in all cases compensate the owner for his loss. If it be satisfactorily established that the loss which the owner has sustained by the wrongful conversion of his property amounts to more than its value at the time of conversion, with legal interest thereon, why should he be confined to the recovery of the latter sum? It is not a full compensation for the loss which he has suffered, and I see no good reason why the law in such case should sanction injustice when it can afford complete relief. There are many cases where it may be established beyond a doubt, that if the owner had not been dispossessed of his property he would have realized more money from it than its value at the time of conversion, with legal interest.

The case of a contract to deliver the property to a solvent purchaser at a price exceeding that it bore at the time of the wrongful conversion, clearly shows the injustice of confining the owner's recovery to the price of the article at the time of conversion, with interest thereon. Under such circumstances it would be pretty clearly established, that if not dispossessed the owner would have realized the enhanced value of the article, which might far exceed the value at the time he was deprived of the possession, with legal interest. Of course it would not be sufficient to show that the owner *might* have taken advantage of an appreciation in the market value. Facts must be shown sufficient to satisfy the jury that he *would* have done so. But it may be said, if the owner is permitted to show that he would have realized more than the market value of the article at the time of conversion if he had not been deprived of the possession, the wrongdoer should on the other hand, as a defense, be permitted to show that if the owner had continued in the possession he would have lost his property entirely, or that it had so depreciated in value that he would never have realized even the value which it bore at the time of its conversion. This cannot be allowed, because, as we stated before, the law will not allow the wrongdoer to make a profit out of his own wrong.

After a thorough and able examination of this question, Justice Duer, in delivering the opinion of the Court in the case of *Suydam v. Jenkins*, (3 Sandford's R. 614) lays down what seems to me to be the correct rule, in the following manner:

"We think it follows from the observations that have been made

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and the illustrations that have been given, that the principles which we have stated as those which ought to determine the amount of the judgment will be carried into effect in all cases *by adding to the value of the property when the right of action accrued, such damages as shall cover not only every additional loss which the owner has sustained, but every increase of value which the wrongdoer has obtained or has it in his power to obtain.* And we are satisfied, after much consideration, that there is no other mode of computation by which, as a universal and invariable rule, the same result can be attained."

This, in my opinion, is the correct rule of damages in all cases arising out of the wrongful conversion of personal property, where the relief sought is damages for such conversion.

The case referred to in 3 Sanford clearly shows also that the highest market value of the property between the time of conversion and the time of trial is not the correct measure of damage, unless it is fully shown that the owner would have realized that value had he not been deprived of the possession by the wrongdoer.

When, however, the action is in equity to compel the redelivery or transfer of stock, as in this case, the rule is different, and it seems to us there can be no doubt as to what the judgment should be. The principal relief asked is a delivery of the stock, and not damages for its conversion, although that is sought as alternative relief. If it appears upon the trial that it is not in the power of the defendant to deliver the stock, the measure of damage most assuredly should be the value of the stock at the time of trial. When the relief sought by the plaintiff is the delivery of the stock, is he to be placed in a better condition by the inability of the defendant to deliver it, than he would be, if the defendant had it in his power to replace or transfer it as prayed for by the plaintiff? In a case of this kind it seems to us the judgment should be for the stock, and in case the defendant failed to deliver it, then that plaintiff recover its market value at the time of trial. The value of the stock in such case is given in lieu of the stock itself. This is certainly the rule in chancery, and we can see no possible means of avoiding it. The plaintiff could undoubtedly have brought his action for damages, and in such case, the judgment would have been for the value of the stock, with

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any additional loss which he could show he had sustained by reason of the unlawful conversion under the rule as above stated.

He has not, however, chosen to bring his action for damages, but for the stock itself. Why should he then be permitted to recover more than the stock, or its value at the time it would have been delivered to him under the judgment, if the defendant had it in his power to deliver it? It is perfectly clear that the plaintiff must be entitled to some relief beyond the delivery of the stock, if he is entitled to a money judgment for more than its value at the time of trial. But here the plaintiff prays for a delivery of the stock, and as it was shown that the defendant did not have it in its possession, a money judgment for its highest market value after conversion is rendered against the defendant. In our opinion, the plaintiff was only entitled to a judgment for a delivery of the stock, or in case delivery could not be had, then its value at the time of the trial.

Upon the ruling of the Court in rejecting the certified copy of the deed from O'Meara to Pettybridge, it is unnecessary to say anything. In my own opinion, the Court ruled correctly in rejecting it, but no such question need come up upon the new trial of this case, for the reason that the preliminary proof which the defendant failed to produce before can readily be supplied at the new trial. Hence it is a question of no importance now, and a further consideration of it is unnecessary.

The question raised upon the deed from the plaintiff to Harris is fully discussed in the original opinion in this case, and upon further consideration we are fully satisfied that we held correctly. Whatever might be the effect of that deed, at law, it cannot be doubted for a moment that Harris could in a court of equity have compelled the defendant to deliver to him the stock representing the number of feet for which he had paid a valuable consideration, if it had not already delivered it to the plaintiff.

He had paid O'Meara for his interest in the North American mine. Will it be said, then, that a court of equity would not compel the plaintiff to deliver the stock which represented that interest to the purchaser? If O'Meara himself could be made to transfer the stock, the company which held it for him could certainly be compelled to do so.

We conclude, therefore, that it made no difference that it was not

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shown that the stock had been delivered to Harris. It was sufficient for the defendant to show that it was liable and equitably bound to deliver it to him if he called for it, which it did do by the introduction of the plaintiff's deed to Harris.

We see no good reason for granting the re-hearing; it is, therefore, denied.

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JOHN HOWARD, RESPONDENT, v. JOHN RICHARDS AND
ELIAS RICHARDS, APPELLANTS.

A complaint setting out a note in full, and alleging the execution and delivery to, and ownership thereof by plaintiff, and that there is "due, owing, and payable" a certain sum, is a good complaint, although it does not in direct terms allege the nonpayment of the note.

The cost bill is no part of the judgment roll, and where there is no statement or bill of exceptions, we cannot pass on its correctness. On a mere appeal from a judgment we cannot review any error which might occur in refusing to sustain a motion made, after the appeal was perfected, to strike out the cost bill.

The mistake in the calculation of the amount for which judgment should have been rendered, should have been corrected by motion in the lower Court.

Appellant having failed to make the application in that Court, we will make it here, but impose the costs on the appellant.

Per BEATTY, J.:

The proper practice in entering judgments is for the Clerk to enter the same within twenty-four hours after verdict, or order of Court for judgment, leaving a blank for costs. If the cost bill is filed within two days after verdict, or order for judgment, the Clerk must fill the blank; otherwise it will always remain blank.

When the blank is filled up it must be considered as of the date of the judgment, and the judgment itself may, by relation, be considered as of the date of the decree for judgment.

In this case the judgment must be considered as of the date of the eighteenth of December, when the order for judgment was made; and it should have been entered up on that or the following day.

If no cost bill was filed within two days after date of order for judgment, none could afterwards be filed.

Where costs are improperly inserted in a judgment, it is the proper practice to move in the Court below to strike them out. But if that motion is denied, the appeal is from the judgment which is erroneous, and not from the order of the Court below refusing to correct the error.

Appeals from orders after judgment are allowed, not to correct erroneous judgments, but to correct some erroneous proceeding subsequent to and founded on a good judgment.

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Section 284, of Practice Act, directs that certain papers shall be brought up on appeal; it does not in express terms prohibit other papers from being brought up.

The Constitution gives this Court the trial of cases on appeal, and the Legislature could not, if it would, deprive the Court of the power of examining such portions of the record as are necessary to determine all appeals.

The Legislature never intended to deprive this Court of the power to examine bills of exception and other parts of the record which are not mentioned in the two hundred and eighty-fourth section of the Practice Act.

We must look into the record to see if there is any foundation for a judgment appealed from. As the filing of a cost bill is the only thing that gives jurisdiction to enter up a judgment for costs, we must look to the record to see if any such bill has been filed, and if an examination of the cost bill filed shows error in the judgment for costs, that error must be corrected.

APPEAL from the District Court of the Eighth Judicial District,
Hon. D. VIRGIN presiding.

The facts of this case are fully stated in the Opinion given in the case.

W. H. Brumfield, for Appellants, filed the following points:

First. The Court below erred in overruling the demurrer to the complaint.

1st. Copies of the notes sued on are embodied in the complaint to supply the place of a statement of facts, required by Section 39 of the Code. (*Prindle v. Caruthers*, 15 N. Y. Rep. 428; *Graves v. Palmer*, 15 Cal. 415.)

2d. The two causes of action are jumbled into one count, without the necessary facts to constitute *one* good cause of action, or count, as required by Secs. 39 and 53 of the Code. (*Telegraph C. v. Patterson*, 1st Nevada Reports, p. 150.)

Second. The Court rendered judgment "according to the prayer of the complaint," (instead of for the amount due on the notes, etc.) The complaint demands judgment for \$158 more than appeared to be due on the notes set out.

Third. The judgment is entered by the Clerk some days after judgment rendered, and after the appeal. It includes a large cost bill which is not filed within the statutory time. The Statute not having been strictly complied with by the plaintiff and the Clerk, this part of the judgment as entered is without authority. (Code of Nevada, Secs. 453, 454; *Kelly v. Van Austin*, 17 Cal. 564;

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Chapin v. Broder, 16 Cal. 418, 419; *Ex parte Burrill*, 24 Cal. 350; *Burnham v. Hays*, 3 Cal. 115, and cases cited.)

I. Atwater, for Respondent, made the following points :

The demurrer was properly overruled ; the complaint does state a cause of action. (*Summers v. Farish*, 10 Cal. 350 ; *Graham v. Camman*, 13 How. Pr. 360 ; *Chappell v. Bissell*, 10 How. Pr. 274 ; *Appleby v. Elkins*, 2 Sand. 673.)

Second. The two notes constitute but one cause of action. No defect in the form of a statement can be taken advantage of upon this demurrer. (*Wilson v. Mayor, etc.*, 15 How. Pr. 500 ; *Moore v. Smith*, 10 How. Pr. 361 ; *Gooding v. McAllester*, 9 How. Pr. 127, 138, 436 ; 17 Howard Pr. 56 and 239.)

The Court did not err in rendering judgment according to the prayer of the complaint, there being no answer denying the amount prayed for to be correct. (*Beal v. Hayes*, 5 Sand. 640.)

The matter of costs cannot be reviewed on this appeal. The cost bill was not filed too late, as there was a stay of proceedings.

Even if regularly filed it does not affect the judgment. There is no appeal from the order refusing to strike out cost bill.

If there was any irregularity in filing cost bill it was in filing it before stay of proceedings expired. Of this appellants do not complain. (4 Cal. 286 ; 5 Cal. 410-417 ; 11 Cal. 361 ; *Eaton v. Caldwell*, 3 Min. 134 ; *Myers & Co. v. Irvine*, 4 Min. 553 ; *Stinson v. Huggins*, 9 How. Pr. 86 ; *Potter v. Smith*, 9 How. 262.)

Opinion by LEWIS, C. J., BROSNAN, J., concurring.

The complaint in this action was in the following form :

" John Howard, the plaintiff, complains of the defendants, John Richards and Elias Richards, and for his cause of complaint alleges that heretofore, to wit: on the nineteenth day of February, A.D. 1864, the said defendants made, executed, and delivered to the plaintiff their promissory notes in writing, of which the following are copies :

" NEVADA TERRITORY, DOUGLAS COUNTY, }
February 19th, 1864. }

" \$1000. On the first day of November next, for value received, we promise to pay John Howard, or bearer, the sum of One

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Thousand Dollars in good lawful money of the United States of America.

“JOHN RICHARDS,

“ELIAS RICHARDS.

“DOUGLAS COUNTY, February 19th, 1864.

“\$1000. On the first day of May, A.D. 1865, for value received, we promise to pay John Howard, or bearer, the sum of One Thousand Dollars in good and lawful money of the United States of America.

“JOHN RICHARDS,

“ELIAS RICHARDS.

“That said notes are long past due, that the plaintiff is now the legal holder and owner thereof, and that there is due and owing and payable thereon from the defendant to this plaintiff the sum of two thousand and three hundred and thirty-three dollars, for which sum the plaintiff prays judgment against said defendants, together with the costs of this action.”

To this complaint the defendants interpose a general demurrer, which was overruled by the Court below, and upon the refusal of the defendant to answer, judgment was rendered in favor of plaintiff, in accordance with the prayer of his complaint, from which the defendants appeal.

It is argued here that the complaint is defective in not alleging the nonpayment of the notes, and that for that reason the demurrer should have been sustained.

In our judgment the complaint is sufficient, though it would have been a much better pleading had it contained a direct and positive allegation of nonpayment. By the rules of pleading which have grown up under the Code of Procedure or Practice Act, all of the mere formal parts of pleadings which the Common Law required are dispensed with, and nothing is now required but a concise statement of the facts necessary to be proven to entitle the party, plaintiff or defendant, to the relief claimed. A complaint is sufficient if it contains a clear, positive, and direct statement of facts which, if proven, will entitle the plaintiff to the relief which he seeks.

This complaint certainly contains allegations of all the principal facts which it would be necessary to establish to authorize a recov-

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ery—the execution and delivery of the notes, the maturity, the ownership of the plaintiff, and that at the time of bringing the action there was “due, owing, and payable” thereon a certain sum of money. The establishment of these facts would have entitled the plaintiff to judgment for the amount due on the notes. But it is said the statement that there is a certain sum “due, owing, and payable” on them is not a sufficient allegation of nonpayment.

It is provided by Section 70 of the Practice Act, that “in the construction of a pleading, for the purpose of determining its effect, its allegations shall be literally construed, with a view to substantial justice between the parties;” and Section 37 declares that “all forms of pleadings in civil actions, and the rules by which the sufficiency of the pleadings shall be determined, shall be those prescribed by this Act.” When tested by the rule that pleadings must be liberally construed, with a view to substantial justice between the parties, we could scarcely say, in a case of this kind, where the notes are fully set out, and the complaint shows the execution, delivery, maturity, and ownership of them, that the statement that there is a certain sum “due, owing, and payable” thereon is not a sufficient allegation of nonpayment. Indeed, the law presumes the nonpayment from the fact that they remain in the possession of the plaintiff. It is somewhat like the presumption of law that bills and notes are founded upon a sufficient consideration, and hence it is entirely unnecessary to allege a consideration in an action upon such instruments; and yet a complaint upon any other species of simple contracts must show the consideration upon which it is founded, or it will be radically defective.

In the case of *Allen v. Patterson*, 7 N. Y. 476, it was held that a complaint was sufficient which in substance stated that the defendant was indebted to the plaintiff in a certain sum of money for goods, wares and merchandise, sold and delivered to the defendant at his request, on the first day of May, 1849, at the city of Buffalo; that the items of account were twenty in number, and then concluding as follows: “And the plaintiffs say that there is now due them from the defendant the sum of three hundred and seventy-one dollars and one cent, for which sum the plaintiffs demand judgment.” It has been said in some of the subsequent cases in New York that this complaint was not an authority as to the standard of

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definiteness and certainty required in pleadings, but it was not considered so defective as to warrant the Court in sustaining the general demurrer interposed to it. Nor does the case of *Allen v. Patterson* come within Section 162 of the New York code, which provides that in actions upon written instruments for the payment of money, it shall be sufficient to set out a copy of such instrument, and then state that there is a certain sum of money due thereon, because that was not an action brought on a written instrument.

Appellant claims that the case of the *State Telegraph Company v. Patterson*, 1 Nevada, sustains his view of the complaint in this case. In that case we merely held that the facts upon which the plaintiff was entitled to recover should be stated—that it was not sufficient merely to state conclusions of law. But where all the facts necessary to constitute a cause of action are alleged, as in this case, we did not hold that a statement of a conclusion of law would vitiate the pleading. We conclude that the complaint is sufficient, and that the demurrer was therefore properly overruled.

As to the question raised upon the cost bill, we are unable to perceive how it can be reviewed upon this appeal. There is no statement or bill of exceptions. The appeal is simply from the judgment, which shows no irregularity in the allowance of costs. The motions made by the appellant, long after the appeal was perfected, to strike out the cost bill cannot be reviewed upon an appeal from the judgment. The cost bill is no part of the judgment roll, and is not properly before us; we cannot therefore inquire into its regularity, nor into any proceedings which were taken after the appeal from the judgment was perfected.

Where there is no statement, and the appeal is simply from the judgment, nothing is brought to the Appellate Court but the judgment roll. (Practice Act, Section 280.) The mistake in the calculation of the amount for which judgment should be rendered, ought to have been called to the attention of the Court below, and a motion made there to correct it, if that could be done. Such a point cannot properly be raised in the Appellate Court for the first time. (*Abel Guy v. Edward Franklin*, 5 Cal. 417.) However, we deem it our duty to correct the error, but to impose the costs of this appeal upon the appellant.

The Court below will therefore reduce the judgment one hundred

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and fifty-eight dollars, which is the sum in excess of that for which properly judgment should have been rendered.

Opinion by BEATTY, J.

I concur in the opinion of the majority of the Court in every part thereof, except as to the judgment for costs. To make my views on that branch of the case more intelligible, I will make a succinct statement of the facts.

On the eighteenth of December, 1865, the Court ordered judgment to be entered for the plaintiff, as prayed for in his complaint. On the nineteenth, and before the judgment was formally entered up by the Clerk, the Court made an order staying proceedings for ten days to enable defendants to perfect an appeal.

A notice of appeal was served and filed on the twenty-eighth day of December, 1865.

On the twenty-ninth, the judgment was entered up by the Clerk, and on the same day, an undertaking on appeal was filed.

On the twenty-sixth of December, for the first time, plaintiff filed his cost bill, amounting to \$194.75, which was included in the judgment entered by the Clerk on the twenty-ninth.

On the eighth of January, 1866, the defendants gave notice of intention to move to strike out the costs from the judgment. This motion was made, and the Court below refused to strike out the costs. Upon this state of facts, the question presented to our consideration is whether that part of the judgment which calls for costs should or should not be held to be erroneous.

Section 197, of the Practice Act, requires the Clerk, within twenty-four hours after verdict, (except in particular cases) to enter judgment in conformity therewith.

Section 453 provides that "the party in whose favor judgment is rendered, and who claims his costs, shall deliver to the Clerk of the Court, within two days after the verdict or decision of the Court, a memorandum of the items of his costs, etc., etc. Taking these two sections together, and it is plain what should be the proper practice. Whenever there is a general verdict for one of the parties to a suit, or an order of Court for judgment on either side, it becomes the duty of the Clerk to enter up the judgment within twenty-four hours after such verdict or order. But, as the suc-

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cessful party has *two* days within which to file his cost bill, it is evident that the judgment may be entered one day before the time for filing expires. Consequently, the Clerk in entering the judgment must of necessity leave a blank therein for the costs. If the cost bill is filed in time, it becomes his duty to fill that blank. If not filed in time, then the blank remains in the judgment, and cannot afterwards be filled.

But when the blank is filled in it becomes a part of the judgment, and must be for most, if not all purposes, considered as of the date of the judgment. In the case of the *California State Telegraph Company v. Patterson*, 1st Nevada, 151, this Court held, that an appeal might be taken from a judgment when such judgment had been ordered by the Court, and a minute made of such order, although the formal judgment had not been regularly entered up by the Clerk.

And I think it must be held, that when the final judgment is entered, it may be treated as bearing date by relation as of the time the order for judgment was made. At least for the purposes of appeal, it must be considered as of that date. In this case, the judgment must be considered as of the date of the eighteenth of December, when the Judge ordered judgment to be entered. The Clerk should have entered up the judgment either on the eighteenth or nineteenth of December, leaving a blank for the costs. No cost bill being filed before the end of the twentieth, the judgment (had the Clerk performed his duty at the right time) would have become complete, and thereafter he could have made no entry in or alteration of the judgment. But the Clerk did not in reality enter up the judgment until the twenty-ninth. This, I think, could not alter the rights of the parties. The judgment was rendered and the Clerk ordered to enter judgment on the eighteenth. Within two days thereafter the plaintiff should have filed his cost bill. Failing to do so, I am of the opinion he lost his right to costs. (See *Chapin v. Broder*, 16 Cal. 418-19.)

Then if the plaintiff had no right to file his cost bill after the twentieth, how were the defendants to take advantage of that failure? Clearly, I think, by appealing from the judgment. The costs were a part of the judgment, and if improperly included in the judgment it was error. It might be very proper in such case,

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after the judgment was by the Clerk made to include costs, to move in the lower Court to correct the judgment, and not to appeal from the judgment until the lower Court had refused relief. But if the lower Court did refuse to correct it, then the appeal would be from the judgment and not from the order refusing to correct the judgment.

The statute provides for appeals from orders made after judgment, but in such cases the appellant is not heard to complain of anything contained in the judgment. But appellant's theory is that the judgment itself is right, and the wrong is in something done after judgment. If the judgment, or any part of it, is to be attacked, the appeal must be from the judgment.

If, for instance, in this case, the Court below had stricken out the costs from the judgment, and the appeal had been by the plaintiff, then undoubtedly the appeal should have been directly from the order striking out. For the complaint would be, not that the judgment contained any error, but that an order made after judgment was erroneous. (See the case of *Maples v. Geller*, 1 Nevada, 233.)

Then, if the appeal from the judgment was the right remedy, the only other question is: Does the *record show* that the cost bill was filed too late? In other words: Is the fact judicially shown to us that the cost bill was filed at a date when the right to file had elapsed? Respondents contend that on an appeal from the judgment, where there is no statement, the Court can only look at the judgment roll. Section 203 of the Practice Act, in relation to judgment roll, reads as follows: "Immediately after entering the judgment, the Clerk shall attach together and file the following papers, which shall constitute the judgment roll: First—In case the complaint be not answered by any defendant, the summons, with the affidavit, or proof of service, and the complaint, with a memorandum indorsed on the complaint that the default of the defendant, in not answering, was entered, and a copy of the judgment. Second—In all other cases, the summons, pleadings, and a copy of the judgment, and any orders relating to a change of the parties."

Section 284 of the Act reads as follows: "On an appeal from a final judgment, the appellant shall furnish the Court with a copy of

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the notice of appeal, the judgment roll, and the statement annexed, if there be one, certified by the Clerk to be a correct copy. On appeal from a judgment rendered on an appeal, or from an order, the appellant shall furnish the Court with a copy of the notice of appeal, the judgment or order appealed from, and a copy of the papers used in the hearing of the Court below; such copies to be certified by the Clerk to be correct. If any written opinion be placed on file in rendering the judgment, or making the order of the Court below, a copy shall be furnished. If the appellant fail to furnish the requisite papers, the appeal may be dismissed."

Now, whilst the last section says what papers an appellant shall bring before this Court, it does not say expressly that none others shall be brought; and even if it had said so, I am of the opinion such law would have been wholly inoperative, null and void. The Constitution gives the right of appeal to this Court. No law of the Legislature could deprive the Court of the power of looking into the record to determine the rights of appellant.

The Legislature may prescribe the terms and mode of taking appeals, and may limit the time within which appeals are to be taken; but, under the pretense of prescribing forms, it cannot deprive parties of substantial rights. But I am of opinion the Legislature never intended this Court to be restricted to the examination of these things mentioned in Section 284. That section does not even provide for bringing up the undertaking on appeal, and without that this Court could not know there was an appeal. It makes no provision for bringing up bills of exceptions, yet the manner of settling such bills is provided for in another section.

When an appeal is taken from a judgment, this Court must of necessity look into the record to see if there is anything therein to sustain the judgment. We must look at the complaint to see that it contains a statement of facts sufficient to warrant the judgment rendered.

We must also, if there is no answer, look at the summons and return, to see that the defendant has been properly brought into Court. So, too, if there is a judgment for costs, it appears to me we must look into the record to see if there is any foundation for that *part* of the judgment; for, without a cost bill, there is no jurisdiction to render any judgment for costs. If, upon looking at

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the cost bill, it appears from that instrument that there is an error in the judgment, it must be corrected. For that purpose we must have the power of causing it to be certified to this Court.

Nor is there anything new or startling in this doctrine. The judgment roll, as directed by the statute to be made up, neither includes bills of exceptions, the verdict of the jury, nor the findings of fact by the Court. Yet all these things constitute a part of the record; and, in California, under a Practice Act very similar to our own, they have held that a case may be reversed on a bill of exceptions, where there is no statement. So, too, the verdict of a jury or finding of facts signed by the Judge, although neither embodied in a statement or bill of exceptions, may, in connection with the pleadings, afford grounds for the reversal of a judgment. (See *Reynolds v. Harris*, 8 Cal. 617-18; see also 5 Cal. 150-51.)

I conclude, then, that the Section 284, which says what the appellant shall bring up, does not preclude the bringing up of other matters of *record* in a case where they are necessary to determine the rights of the parties.

In conclusion, I hold the judgment should be treated as a judgment of the date of December 18th, 1865. That no bill of costs having been filed on or before the twentieth of December, the judgment that day was perfected, and the blanks for costs could not thereafter be filled up. It appearing from the filing of the cost bill that it was not filed before the twenty-sixth, it was a nullity, and that part of the judgment which is for costs is erroneous. That part of the judgment should be stricken out, and the appellant should recover his costs.

I think the order of Court staying proceedings has nothing to do with this question. The order was not intended to stay the filing of a cost bill, and certainly it was not so understood by the plaintiff, for he filed his bill whilst the order was in full force.

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2	187
3	527
13	301

As a general rule, bills of exception once signed and filed, become a part of the record. Whether in case of mistake in stating fact they may, after term expired, be in any case corrected : Query ?

A bond given to release property taken under a writ of attachment is a bond given in a legal proceeding, and does not require a stamp.

Where a bond is given for the use of a party to an action, but is in the hands of an officer of the Court, the beneficiary of the bond may bring suit thereon before the bond has come into his possession.

Whether the statement in an affidavit that affiant has been informed that defendant has sold certain teams, wagons, etc., with intent to defraud his creditors, is a sufficient compliance with that part of the Statute which requires the facts to be recited on which affiant's opinion is based, before the issuance of the attachment : Query ?

Where a debtor tells a creditor that he has disposed of all his property, and will pay when he gets ready, it creates a strong suspicion of fraud, and is a sufficient foundation for a belief in the creditor's mind that a fraud has been committed.

If there is some evidence to justify the belief on the part of an attaching creditor that fraud is contemplated or has been committed, he may sue out an attachment.

On the trial, that fraud may or may not be established ; but if plaintiff fails on the trial to establish the fraud, still the issuance of the attachment was not a void act.

Great strictness in the form of the affidavit should not be required. The defendant is protected by bond.

What is recited in a bond to be true, is taken as true against the obliger, and need not be averred or proved.

It is only necessary to make averments and proof as to what was done after the execution of the bond, and as to the breaches thereof.

Calling the Court's attention to a part of a record by defendant, whilst plaintiff is proposing to introduce other portions of the same record as evidence, cannot be treated as an introduction of that part by the defendant.

The Courts, in construing a bond, cannot interpolate into it conditions it does not contain.

Where a bond for a release of goods under an attachment is conditioned for payment, if judgment is rendered against the owner of the goods attached, it becomes absolute upon the rendition of judgment whether the attachment is or is not sustained.

A plea similar to that of duress : that the contract had been entered into only to avoid some threatened seizure or destruction of property, has sometimes been allowed in American Courts. But this plea can only be tolerated in cases of imminent danger, when the party has no other apparent means of saving his property from destruction, conversion, or asportation.

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Where property is attached, the attaching creditor gives bond for damages. The debtor is in no imminent peril of losing his property.

There is nothing in the policy of the law to forbid a bond given to release property from attachment, being enforced according to the very letter of its condition. *Caldwell v. Colgate* and others, 7 Barbour, S. C. Reports, and *Homan et al. v. Brinkerhoff*, 1 Denio, 184, denied to be law.

The rule laid down in *McMillan v. Dana*, 18 Cal. 339, contains the true rule.

Per *BROSNAN, J.* The affidavit on which the attachment in this case was issued, met the requirements of the Statute.

Per *LEWIS, C. J.*, dissenting. The dismissal of an attachment operates as a complete release of the sureties on the bond for release of attached property.

When a plaintiff fails to show his case is one of those in which an attachment is authorized to issue, he is not entitled to the benefit of the lien created by the attachment. Why should he be more entitled if defendant overturns his *prima facie* case, on which it was issued?

If the attachment is discharged, the property attached is necessarily released; so, too, if the attachment is held to have been improperly issued, the bond must become unavailable.

A bond given to release property illegally attached, may be held as one given under duress of property.

The bill of exceptions shows the order dismissing attachment in former case was introduced. However irregularly that order was brought before the Court, it is good defense, and must be considered in disposing of the case.

The principal in the attachment bond should have been made a party defendant.

APPEALED from the Fourth Judicial District, Hon. C. C. GOODWIN presiding.

The facts are stated in the Opinion.

Wells & Clarke, for Appellants, made the following points:

The demurrer to the complaint should have been sustained. It was defective in these particulars: . It does not show the attachment in case of *Bowers v. Atkinson* was based on a sufficient affidavit and undertaking filed in that case. Nor that the case was one in which such writ might legally issue. (7 Hill, 39, 41, 43; 1 Hill, 343; 18 Cal. 348; and cases cited by Judge Field; 9 Wend. 237; 3 Wend. 54; 4 Wend. 616; 6 Cow. 221-225; 3 Denio, 567; 2 Chitty's Pl. 457-460; 23 Cow. 247; 7 Leading Cases, 562; 3 Chitty's Pl. 1088; 3 Barber, 175; 7 Cal. 562; 9 Cal. 265.)

The Court erred in finding for plaintiff. First: because the attachment bond sued on was not stamped. Second: it was in the custody of the Court, and not of the plaintiff, when suit was brought.

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Third: the affidavit for attachment was defective. Fourth: no undertaking was shown to have been given in the case of *Bowers v. Atkinson*. (Drake on Attachment—Secs. 83–91; Stat. 1861, p. 333, as to affidavit and undertaking; 6 Wheaton, 119; 6 Peters' U. S. 691–709; 14 Wend. 237; 18 Wend. 611; 21 Wend. 672; 4 Hill [N. Y.] 598; 5 Hill, 195; 6 Hill, 313; 3 Hill, 619; 16 Wend. 524; 6 Johnson, 11; 2 Johnson, 47; 23 Wend. 480; 13 Wend. 46; 1 Denio, 184; 1 Code Rep. N. S. 269; 3 Cowan, 206; 1 Cal. 163; 2 Cal. 17 and 254; 3 Cal. 363; 2 Bouvier's Law Dict., title "Regular and Irregular Process;" 7 Hill, [N. Y.] 187; 7 Barber, 253; 1 A. K. Marshall, 354; Stat. 1861, p. 333, secs. 120, 121; State and Federal Statutes as to Stamps.)

The writ of attachment in the case of *Bowers v. Atkinson* was dismissed, and this operated as a release of the sureties on the bond given for return of attached property. (7 La. Reports, 668; 14 La. 82; 5 Ark. 457; 9 Ark. 159; 7 Barb. 253.)

Thos. Fitch and *J. Neely Johnson*, for Respondent, made the following points:

No motion for new trial having been made, this Court will not review the finding of facts. (2 Cal. pages 119, 120; *ib.* 23 and 484.)

There being no proper statement on appeal the finding of facts is conclusive. If the conclusions of law are warranted by the facts found, the judgment must be affirmed. (2 Cal. 148; 8 Cal. 90, 323 and 510; 9 Cal. 68–95, and 211; 10 Cal. 193; 11 Cal. 340–391; 12 Cal. 280; 16 Cal. 185.)

The liability of the sureties was fixed by the judgment. (*Haynes v. Josephi*, 26 Cal. 540; *Heyneman v. Eder*, 17 Cal. 436.)

Sureties have no right to attack the judgment or any of the provisional remedies. (*Riddle v. Balor*, 13 Cal. 305, 306.)

The bond is conditioned to become absolute on the rendition of a judgment for plaintiff. The rendition of the judgment fixed the liability of the sureties. There can be no inquiry as to the regularity of the attachment. (*Pico v. Webster*, 14 Cal. 204; *McMillan v. Dana*, 18 Cal. 339.)

Bonds taken in a legal proceeding are not subject to stamp tax.

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This was such a bond. (See sections 123, 127, 134, 336 and 337 of Practice Act.)

A bond received by the Sheriff which is not in compliance with the statute is still a good common law bond, and the plaintiff is entitled to recover on it. (See Drake on Attachment, sec. 314, page 317.)

From the time of execution of bond the case ceases to be one of attachment, and proceeds as if simply instituted by summons. (*Hopper v. Ball*, 2 Bibb. 221.)

After execution of bond no exception to the attachment or regularity of proceedings under it can be taken. (*Barry v. Fayles*, 1 Peters' [7 Curtis' Edition,] top page 594.)

Opinion by BEATTY, J.

This was an action brought on a bond given to release property held under attachment.

Bowers brought suit against G. W. Atkinson for some one thousand six hundred and sixty dollars, and at the time of filing his complaint, also sued out a writ of attachment. The attachment was levied on certain property, and the defendants in this action, in conjunction with defendant in the former action, executed a joint bond conditioned as follows :

" Now, the condition of this obligation is such, that whereas, a writ of attachment was issued against the above bounden George W. Atkinson, at the suit of L. S. Bowers, and certain of his goods and chattels have been attached under and by virtue thereof.

" Now, in consideration of the release of said goods and chattels from such attachment, if the said George W. Atkinson shall well and truly pay any judgment and costs that the said L. S. Bowers may recover against him, the said G. W. Atkinson, then this obligation to be null and void, otherwise to remain in full force and effect.

" G. W. ATKINSON, [Seal]

" H. H. BECK, [Seal]

" H. A. KENDALL, [Seal]."

Judgment was rendered for plaintiff. He attempted to make the same by issuance of execution, and failing to collect it of Atkinson

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he demanded the amount from the sureties on the bond. They failed to pay, and Bowers instituted this proceeding.

The complaint sets out the indebtedness of Atkinson to the plaintiff, the suing out of the writ of attachment, the making and filing the necessary affidavit, and undertaking to procure the issuance of the attachment, and that the sheriff to whom the attachment was issued made a levy on personal property. That, to procure the release of said property, defendants made, executed, and delivered the bond sued on. That the property, on the delivery of said bond, was released. The rendition of the judgment, the failure to collect the same on execution, the demand on defendants, etc.

The substantial defenses set up in the answer are: First. That the attachment under which the property was seized, was void for want of a sufficient affidavit. Second. That on trial it was found and adjudged that the facts alleged in the affidavit were not true, and therefore the goods were not legally attached.

Upon the trial of the suit between Bowers and Atkinson, whilst the main issue was found for Bowers, it was at the same time determined that the attachment has been issued improperly, or without sufficient evidence, and the same was discharged.

There is a question, however, in this Court whether the discharge of the attachment in the suit of *Bowers vs. Atkinson* was shown in the Court below.

When this case was first called, appellants suggested a diminution of the record. This motion, and the affidavits filed in support thereof and in opposition, brought out the following facts: One of the counsel for appellants, after judgment for respondent, prepared a bill of exceptions, setting out fully the proceedings on the trial and exceptions taken by the appellants. An associate counsel for appellants, in looking over the bill of exceptions, thought there was an omission in the statement as prepared by the other counsel, and made an interlineation supplying that supposed omission. The counsel who first prepared the statement then took it to the Judge and procured his signature thereto. Some time afterwards, when the Court had adjourned for the term, the Judge's attention was called to the bill of exceptions he had signed. He thought that part of it which was contained in the interlineation was not correct, and he struck it out by scratching his pen over the interlineations. He

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makes an affidavit that he made this correction because he signed the bill of exceptions without examination, relying on the statement of counsel that it was correct and assented to by opposing counsel, when, in fact, the records of the Court clearly showed that appellants had never introduced any such evidence as was stated by the interlineation to have been introduced, and in fact, that defendants never introduced any evidence at all.

This Court is called on to decide whether they will act on the bill of exceptions as originally signed by the Judge, or as corrected by him after the interlineation was struck out.

As a general rule we think a bill of exceptions once signed by the Judge and filed among the records of the Court, (especially after the expiration of the term at which it was signed and filed) becomes a record in the case and beyond the control of the Judge. At least, it would be a very dangerous practice to allow amendments and alterations at a subsequent term of the Court. Still, we are not prepared to say, if a Judge inadvertently signs a bill of exceptions which states a fact which never existed, that it may not in any case be corrected.

If the minutes of the Court or other documentary evidence should clearly show the mistake, probably it might be corrected in the Court below. But that point it is not now necessary to decide. In this case, it is evident that the Judge mistook the meaning of the clause he struck out. He struck it out because the record showed defendants had never introduced such evidence, nor any evidence. Retaining it in the bill of exceptions, it does not show, or purport to show, defendants introduced any evidence. We are inclined, then, to hold that the bill of exceptions should be considered as it was when signed by the Judge, and before this clause was stricken out.

The bill of exceptions, then, shows that plaintiff "offered in evidence the complaint, the affidavit for attachment, and writ of attachment, and return thereon, in the suit of *L. S. Bowers v. Tennessee*, alias *G. W. Atkinson*." * * * * "And the defendants, by their counsel, then and there objected to their introduction as evidence, on the ground that the said complaint showed upon its face that the cause of action sued upon was not one in which the plaintiff could legally invoke the aid and issuance of a writ of attachment; that said affidavit was irregular, and not in compliance

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with the statute in such case made and provided, and insufficient to support the issuance of a writ of attachment; was irregularly and illegally issued; was void, and all proceedings thereon were illegal and void, *and had been so adjudged by this Court, as shown of record in evidence.*" After the word evidence, follows a direction to include the order dismissing the attachment as part of the bill of exceptions. That order is in these words: "Defendants' counsel moved to set aside attachment. The following witnesses were called on part of plaintiff: L. S. Bowers and William Berick; and on part of defendant, A. Jackson, John Dolson, Geo. W. Atkinson, and Kellem. Motion of defendant sustained, plaintiff excepted."

The words italicised and the direction to include the order dismissing attachment are those stricken out of the statement by the Judge, but which we shall consider as a part of the statement. But whilst we shall consider this part of the statement in the bill of exceptions, we do not think it shows that either the plaintiff or defendant introduced the judgment or order dissolving the attachment in evidence. The defendants, at the time this order was alluded to, were not offering anything in evidence. They were objecting to evidence offered by plaintiff. Whilst plaintiff was offering in evidence some of the papers filed in the case of *Bowers v. Atkinson*, it would seem (giving a fair construction to this part of the statement) defendants called attention to an order made in the same case, the existence of which ought to operate on the mind of the Judge as a reason for rejecting the other papers. In other words, the defendants would seem to have claimed that the record in *Bowers v. Atkinson* should not be produced piecemeal; but if offered, must be offered as a whole, and if the record considered as a whole failed to sustain plaintiff's action, no part of it should be received in evidence. The statement does not show that there was an affirmative attempt on the part of defendants to introduce this order as evidence on their side. At best, if offered in evidence by defendants, it was only for the special purpose of showing the other papers offered should be rejected. That being the case, the respondents can only be entitled to a reversal of the case on one of two theories: first, that the papers and other evidence offered by the plaintiff and admitted by the Court failed to establish plaintiff's cause of action, and entitled defendants to a nonsuit; or, second,

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if all the papers which constituted a part of the proceedings in *Bowers v. Atkinson* were excluded, then the other evidence offered by plaintiffs was insufficient to support the action, and entitled defendants to a nonsuit.

First, let us see how the parties stand, admitting these things to have been properly in evidence which were offered by the plaintiff and received by the Court. We have already stated what papers were offered in evidence by the plaintiff. Appellants contend, first, there could be no recovery on the bond because it was not stamped. To this we say the bond *was one given in a legal proceeding*, and did not need any stamp under the revenue laws of either the State or United States.

The second point made is, that the bond was not in the possession or under the control of plaintiff when the suit was brought, but in the hands of the Clerk of the District Court for the Second Judicial District, and was not in plaintiff's power until subsequently delivered to him by order of the Court.

It is sufficient that the bond was made for the benefit of the plaintiff, was made payable to plaintiff, and was in fact his bond, whoever had the custody of it. The mere fact that a plaintiff does have the actual custody of a bond when suit is brought, is no reason for abating the action. If he is the legal owner of the bond, and can produce it at the trial, that is time enough.

The third point of appellants on this branch of the case is, that the affidavit for attachment is so defective on its face as not to show any authority for the issuance of the writ; in other words, that the writ of attachment was void, and that being void the bond was also void. This objection naturally divides itself into two propositions: Was the attachment void? If void, does it follow that the bond is void?

The statute says that the Clerk shall issue a writ, when an affidavit shall be filed, showing: "First, that the defendant is indebted to the plaintiff in a certain sum (specifying the amount of such indebtedness) over and above all legal set-offs or counter claims, upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this Territory, and that the payment of the same has not been secured by any mortgage on real and personal property. Second, that the deponent

has good reason to believe, and does believe, that one or more of the causes set forth in the several subdivisions of the next preceding section actually exists at the time of making the affidavit, reciting the facts upon which such belief is founded."

We think there is no question that the affidavit in this case conforms to the statutory requirements in everything, except it may be in not "reciting the facts upon which such belief is founded." "Such belief" in this case is the belief on the part of plaintiff that defendant had fraudulently, or was about fraudulently, to convey his property, to hinder and delay plaintiff in the collection of his debt. Plaintiff states that his reason for this belief "is that the defendant herein has, as deponent is informed and believes, fraudulently conveyed, sold, and assigned certain teams, wagons, and property, for the purpose of hindering, delaying, and defrauding his creditor, this deponent, and as deponent is informed and believes, is about to fraudulently dispose of all the rest of his property, for the purpose of hindering, delaying, and defrauding this deponent, his creditor; and because the defendant herein on the twentieth day of April, A.D. 1865, informed this deponent that he had sold all his (defendant's) teams and personal property, and did not own a hoof of the stock, and would 'pay when he got ready,' or words to that effect."

The law says the Clerk shall issue his attachment when plaintiff makes oath to his belief, and recites the facts on which his belief is founded.

Now, does the language quoted recite any facts on which such an opinion might be founded? He recites that he has been informed defendant had made a fraudulent conveyance. If this part of the affidavit is true, is not this a fact upon which he has a right to frame an opinion? But it may be objected that this is mere hearsay evidence, and that he should have procured the affidavit of his informant. Or it may be said that this is too general; that it was merely stating the general result instead of stating the particular facts which constituted or showed the frauds. Perhaps it is not necessary in this case to determine these questions. There is one circumstance he does state with particularity and upon his own information. That is the conversation he had with the plaintiff on or about the twentieth of April, 1865. That conversation

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as detailed was not perhaps enough to establish fraud in defendant if not supported by other circumstances, but was certainly sufficient to create suspicion and a well founded belief in the mind of plaintiff that defendant had made a fraudulent disposition of his property. We think when a debtor tells a creditor he has disposed of all his property and will pay when he gets ready, it creates a very strong suspicion of fraud, and a creditor may from such language well draw the conclusion that a fraud has been committed.

In the case of *Cornell v. Lascells*, 20 Wend. 77, a question was raised as to the sufficiency of an affidavit to support the attachment issued thereon. The affidavit was very similar in character to the present one. The Court was then composed of three Judges, C. J. Nelson, and Bronson and Cowen, Justices. Two of the Judges held the affidavit not sufficient. But in reversing the judgment, the Chief Justice says: "We might possibly have considered it sufficient to uphold the judgment until reversed;" thus intimating that although the facts stated in the affidavit were not of that conclusive character to justify the Justice who issued the attachment, still they tended to prove a fraudulent intent and would sustain the jurisdiction of the Justice until reversed.

Mr. Justice Cowen dissents. In his dissenting opinion he says, among other things: "The * * Act * * gives an attachment whenever a Justice is satisfied, on the facts and circumstances sworn to by the party, that the debtor has fraudulently assigned or disposed of his property, or is about to do it." He then argues that the circumstances detailed in the affidavit are sufficient to show fraud, or at least if such circumstances had been detailed to a jury and they had found fraud on them, no Court would have been justified in setting aside the finding. He thinks the judgment should have been affirmed.

Chief Justice Bronson, in giving an opinion on the subject of attachments, 7 Hill, pages 188-9, says: "The facts and circumstances to establish the grounds on which the application for an attachment is made, must be verified by the affidavits of two disinterested witnesses." We have quoted from the opinion because we have not the New York revised statutes to refer to. In 4 Hill, in the case of *Faulkner*, pages 598 to 602, he discusses what facts must be made to appear by the affidavit to make the attachment

valid, and concludes: "Now, although the evidence was far from being conclusive, still it had a legal tendency to make out a case, in all its parts, for the issuing of an attachment. Enough was proved to call upon the officer for the exercise of his judgment upon the weight and importance of the evidence; and if he erred in the decision of a question thus fairly presented, the error would not be fatal to the proceedings. It is only when there is a total want of evidence upon some essential point that the officer will fail to acquire jurisdiction."

Taking then the views expressed by Mr. Justice Cowen in the case cited from 20 Wendell, or those expressed by Chief Justice Bronson in the cases cited from 4 Hill, and they alike uphold the attachment. That is, they hold that such attachment is not *void*, but that the *prima facie* case for attachment may be rebutted by defendant in attachment.

We think this is certainly good law. A party suing out an attachment may receive such information as convinces him beyond all reasonable doubt that a fraud is contemplated, and if he waits to get all the particulars so as to set them out in his affidavit, the fraud may be consummated and the property gone before he gets his writ. But if he is allowed to get the writ upon a general showing of the reasons he has for believing a fraud has been practiced, or is about to be practiced, he may, when the case comes on for trial, be able to prove the fraud by satisfactory evidence. Our statute is quite different from the New York statute. The latter requires the facts to sustain the attachment to be proved by the affidavits of disinterested witnesses. Ours only requires the party to swear to his belief in the existence of certain main facts, and to state the subordinate facts on which that belief is founded. Certainly, that belief might be founded on information derived from others. We need not introduce the affidavit of others to prove the facts on which he founded his belief, but if a trial of the question as to the propriety of issuing the attachment arises, he can have the benefit of their testimony.

The statute requires a person suing out an attachment to give bond for all damages caused thereby, if the proceeding by attachment is not sustained. This is sufficient protection for the defendant. We do not think great strictness should be required

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in setting out the facts to authorize the issuance of the attachment. Not so much as in those States where the attachment serves in lieu of a summons, and authorizes the Court to enter judgment against defendant without actual service on him. This, we are of opinion, was not a void attachment, and the alleged insufficiency of the affidavit was no defense to this action.

The attachment not being void, let us consider what would have been the situation of the parties, if the Court had ruled out the complaint, affidavit of attachment, writ of attachment, and return thereon, as offered by the plaintiff. The bond sued on recites that whereas an attachment was issued and certain goods have been levied on, etc. "Now, in consideration of the release of said goods and chattels from such attachment, if the said G. W. Atkinson shall well and truly pay any judgment and costs that the said L. S. Bowers may recover against him, the said G. W. Atkinson, then this obligation to be null and void; otherwise, to remain in full force and effect." Whatever the obligor recites in a bond to be true, may be taken as true against him, and need not be averred in a complaint on such bond, nor proved on the trial. That the goods were under attachment is clearly recited. Perhaps it is not so clearly recited that the goods are released when the bond is delivered, but the language used may mean that they are to be released. In that case, it appears to us, all the plaintiff has to do is to aver the release did take place at or after the delivery of the bond, and then prove the breach on the part of the obligors. If this be so, then there was no necessity for averring the existence of a complaint, affidavit of attachment, attachment, return, etc.

This is the view taken by the Chancellor of New York and concurred in by the entire Court for the correction of errors, except one Senator, in a case precisely similar to this. See *Kanouse v. Dormedy*, 3 Denio, 567. We entirely concur in the correctness of this decision.

This, we think, disposes of the entire case. But appellants contend that although they did not, after the plaintiff closed his case, offer any testimony, yet they should stand in this Court just as if they had regularly offered in evidence the judgment of the Court dismissing the attachment, on the ground that plaintiff did not sus-

tain by sufficient evidence his allegations to support the issuance of the attachment.

We cannot think that the mere calling of the Judge's attention to that order or judgment as a reason for rejecting other portions of the record of *Bowers v. Atkinson*, when offered by the plaintiff in this action, is equivalent to offering it in evidence by the defendants.

But, even if it were in evidence, the writer of this opinion is unable to see how it would alter the result. The defendants have voluntarily entered into a bond to pay any judgment that might be recovered. There was no condition in the bond that they would pay provided the *attachment was held good* and a judgment rendered, but simply on condition that the judgment was rendered. Upon what principle can we interpolate the other condition? The parties to the bond did not make any such condition; the statute authorizing the bond does not speak of any such condition. Doubtless, if a bond with such a condition had been tendered, the plaintiff would not have released the goods. The statute does not require him to release them, except on a bond with one single condition, and that is as to the rendition of judgment.

There are only two principles upon which it can be contended that the bond would be void in case the attachment was void, or not supported by sufficient evidence where that issue was tried. The one is, that the goods of defendant Atkinson, being illegally held, the bond was given under a species of duress; the other, that it would be against public policy to support bonds given under such circumstances.

At common law, the plea of duress only applied to cases where the person of the defendant was either held in custody, or threatened with violence or imprisonment. That plea could not be sustained by any proof as to seizure or threats against property. Modern American cases have had a tendency to extend that plea, or one similar to it, so as to annul contracts made to avoid threatened destruction or detention of property. But those pleas have never been allowed except in extreme cases, when the danger of destruction, conversion, or asportation was imminent, and no other apparent method of saving the property.

Here there was no such necessity. Atkinson had a bond to in-

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demnify him for all losses sustained by the improper issuance of the writ, and the property itself was in the custody of the law. (See Parsons on Contracts, vol. 1, pp. 319 to 322, and notes, etc., as to the general rules governing this defense.)

We cannot see in what respect such bonds are contrary to the policy of the law. The defendant in an action of debt or assumpsit has his goods attached. Rather than wait to see whether the attachment can or cannot be discharged in the due course of law, to obtain the immediate possession of his goods, he gives a bond to the effect that he will pay any judgment obtained against him. Now, if a judgment is obtained against him, we see no great hardship in his having to pay it. We do not think it is violating any true policy of the law to make him and his sureties liable therefor, according to the letter of their bond.

In the case of *Caldwell v. Colgate* and others, 7 Barbour's Supreme Court Reports, page 253, it was distinctly held that a bond given to release property seized under a *void* attachment was itself void. And the case of *Homan et als. v. Brinkerhoff*, 1 Denio, 184, seems to be to the same effect. So, too, it would seem from references made by Mr. Drake in his work on Attachments, that it has been held in Louisiana, or at least strongly intimated, that if after goods were released from attachment by bond, it should be determined that attachment had been improperly issued, the sureties on the bond for the release of the property would be discharged. With regard to the New York cases last cited, the writer of this opinion must say he does not think they are good law. With regard to the Louisiana cases, not having access to the opinions themselves, nor to the Statute of Louisiana in relation to attachments, and scarcely any knowledge of the Civil Law which prevails in that State, I am unable to form any opinion about these cases. I think the true rule is, that when such a bond as the one under consideration is given, you cannot go back to inquire as to whether the attachment was regular or irregular. The only questions are, was the property released, and has a breach of the bond been shown. This is the view taken of such a case by the Supreme Court of the State of California, in *McMillan v. Dana*, 18 Cal. 339, and I think the correct view.

Judgment affirmed.

Opinion by BROSNAN, J.

I concur in the affirmance of the judgment of the District Court. I hold that the complaint, though susceptible of much improvement, is sufficient; and that the affidavit upon which the attachment in the original suit was based, answered the requirements of the statute.

Although I do not believe in the doctrine that a Court or Judge loses all power and jurisdiction over all orders and judgments after the expiration of the term at which they may be made and rendered, to the full extent claimed and asserted, yet, for the purposes of this case, I wish to be understood as holding that the statement contains the words erased by the District Judge. But this, in my opinion, will not help the appellant's case. With these words in, the record does not show that the order dismissing the attachment in the original suit was introduced, offered, or made evidence in any way in the case.

At that stage of the trial when the plaintiff offered in evidence the complaint, affidavit, and attachment in the original action, the defendants' counsel objected to their competency, and in stating the grounds of objection, assigned as one of them in substance, "that the District Court had adjudged the attachment, and all the proceedings thereon, illegal and void," which objection the Court overruled. This is not a statement that the order or judgment of the Court to that effect was introduced in evidence; and it is a conceded fact that it was not so introduced. It is no more than stating a ground of objection to the testimony, which may be well or ill-founded, like any other ground or reason assigned. But to hold that such an incidental allusion to what the Judge may have done, or to what may have transpired in a different action and between different parties, is tantamount to the actual record proof of the existence of the fact, is a doctrine to which I cannot subscribe. In my humble judgment the record does not contain any legal proof of the dismissal of the attachment in the original action. I am of opinion, therefore, that the judgment of the District Court ought to be affirmed.

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Dissenting Opinion of LEWIS, C. J.

In my opinion the dismissal of the attachment upon the issue raised by the plea in abatement to the affidavit, was a complete defense to the action on the bond, and the judgment of the Court below should for that reason be reversed. The statute in certain specified cases authorizes the plaintiff to sue out an attachment against the property of his debtor for the purpose of securing any judgment which he may recover. Section 120, of the Practice Act, declares that "the plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment in the following cases:"

If the plaintiff does not show that his case is one of those in which an attachment is authorized, he is not entitled to the security which this summary proceeding gives him. Why should he be if the same fact is established by the defendant upon the issue raised by an answer to the affidavit? If, upon the trial of that issue, the Court determines that the plaintiff was not entitled to have the property of the defendant attached, it is a direct decision that he has no right to claim the security which is given by attachment, and that he is entitled to no advantage from the issuance of it. It must be admitted that if the writ is dismissed, the defendant's property taken under it, if in the possession of the plaintiff, or the officer, must be given up or returned, and the plaintiff loses his security. Why should he be in any better position if the defendant has given a bond in accordance with the statute to release his property? The bond is a mere substitute for the property itself. (Drake on Attachment, Section 321.) The statute provides that the bond may be given in lieu of the property as security for any judgment which the plaintiff may recover. If then it is determined by solemn adjudication that the plaintiff was not entitled to have an attachment issue, or to the aid of that collateral proceeding, upon what ground can he continue to hold the security which he has obtained by means of it, and maintain an action upon a bond which it has been judicially determined he was never entitled to, and which was obtained by his own wrong?

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If the property is released upon the dismissal of the attachment, upon what reason can it be claimed that the bond, which in fact takes its place, should be held as security against the defendant? It seems to me that when the attachment is set aside, all the proceedings growing out of it must fall with the writ. As an execution falls when the judgment is set aside, so it would seem that the entire proceedings upon a writ of attachment fall when the writ itself is quashed. The plaintiff has no more right to maintain an action on the bond than he has to retain the defendant's property after the attachment is dismissed. If it be determined upon the trial of the issue raised by the plea in abatement that the plaintiff is not entitled to have the defendant's property attached, any security which he may have obtained by means of the writ is founded upon his own wrong, and for that reason, if for no other, he should not be permitted to derive advantage from it. In Louisiana, under a statute, as I judge from what is said of it by Mr. Drake, in his work on Attachments, Sections 317 and 318, it was held that a dissolution of the attachment was a complete defense to the bond given to release the property; and in the case of *Caldwell v. Colgate*, 7 Barbour, 258, and *Homer v. Brinkerhoff*, (1 Denio, 184) it was held that if the attachment be void by reason of a defect in the affidavit or otherwise, suit could not be maintained on the bond given to release property taken under the writ. If that be the law, I am unable to see why the dissolution of a voidable attachment does not produce the same result so far as the bond is concerned. When the attachment is void there is nothing to support the bond. Being founded upon a void proceeding, it is itself void. So also with a bond given, and the writ is subsequently dismissed, the bond having been given in a legal proceeding, and that proceeding having been set aside, the bond should fall with it. The bond in such case is not given voluntarily, but *in invitum*, and should not be treated as if given without restraint to secure the payment of a just debt.

Again, if the attachment be illegally issued and the defendant gives a bond as prescribed by statute to release his property taken under it, he might easily say that it was given under duress of goods, and avoid it on that ground. True, in England duress of goods is not deemed sufficient to avoid a contract, but in this coun-

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try it seems to be recognized as a good defense. (1 Parsons on Contracts, 321, note.)

But it is said that the bill of exceptions does not sufficiently show that the attachment was dismissed. In my opinion it does. One of the objections urged to the introduction of the attachment proceedings in evidence was that the writ had been dismissed, and from the language used in the bill of exceptions I could arrive at no other conclusion than that the order dismissing it was introduced in evidence at the time. It can hardly be presumed that the Court would take cognizance of the order unless it were introduced in evidence at the time the objection was taken. If the bill of exceptions shows that it was introduced in evidence, whatever may have been the immediate purpose for which it was introduced, it should receive its full effect as a defense to the plaintiff's action. If the dismissal of the attachment is a complete defense to the action, and that fact is properly brought to the knowledge of the Court, it should have its full effect, notwithstanding it may have been brought to the notice of the Court at an improper time in the trial, or its full effect escaped the attention of counsel.

The defense is fully before us, and it seems to me should not be passed over merely because it was interposed in the shape of an objection to the introduction of testimony by the plaintiff. I agree with the views expressed by Justice Beatty, that after an appeal is perfected and the lower Court has adjourned for the term, the Judge below has no authority to correct the record without an order from the Appellate Court for that purpose. Hence I conclude that the bill of exceptions should stand as it was at the time the appeal was taken.

If the principal in the bond is living, and was capable of contracting, he should have been made a party defendant with the sureties. The action is upon a joint contract, and all the parties to it should be united. However, this is an objection which could only be taken advantage of on special demurrer, which was not done here. I conclude that the judgment should be reversed, and a new trial awarded.

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RESPONSE TO PETITION FOR RE-HEARING.

If the Legislature passes an Act amending a former Act, but providing the amendatory Act shall not take effect until a future day, the old Act remains in full force until the amendment goes into operation.

So, too, if it is provided in the amendatory Act that such amendments shall only be operative for the enforcement of future contracts, the old law is in full force, so far as relates to the enforcement of prior contracts.

Per BEATTY, J. Whether the debt on which the attachment, in *Bowers v. Atkinson*, was one on which an attachment might legally issue or not, is wholly immaterial. The bond recites that the goods to be released were attached; the obligors cannot contradict that recital.

The clause in the Stamp Acts of the State and United States which exempts from stamp duty those bonds which are "required in a legal proceeding," is not confined to those bonds without which no action could be maintained or prosecuted, but is more general, and means all bonds required to give either party to a legal proceeding any advantage or privilege, to which he would be legally entitled in the course of that proceeding upon the execution of a proper bond.

In a trial before the Court without a jury, where one party offers a paper in evidence, and the other side objects, and the objecting party hands the paper to the Judge for inspection to see whether it shall not be excluded, and the paper is excluded, the objecting party cannot afterwards claim that the paper was in evidence because of the fact that it was read by the Judge for this special purpose.

So, if one side offers in evidence a certain number of papers selected from a bundle, and the other side objects because there are other papers belonging to the same bundle, which he claims would show those papers offered should not be admitted in evidence, and he calls the attention of the Court to those other papers, and induces the Judge to read them before deciding the objection, this does not put those latter papers in evidence for the general purposes of the trial.

Opinion by BEATTY, J.

The appellants in this case petitioned for a re-hearing, and based that petition on three grounds. These we will notice in the order in which they are presented in the petition. The first proposition is stated in these terms: "The demurrer should have been sustained in the District Court, because the complaint in the cause does not allege *when* the cause of action sued upon in *Bowers v. Atkinson* arose. The complaint, in *this* case, should show *per se* that the cause of action in *that* was one in which the plaintiff could legally invoke the aid of a writ of attachment by a *compliance* with the preliminary requirement of an *existing operative* attachment law."

In support of this proposition, it is urged that the amendments to the attachment law passed in 1864-5, totally abrogate the former attachment law, and as those amendments only apply to debts contracted after April, 1865, no attachment could issue to secure a debt created prior to that time. Reference is made to Section 17 of Article IV, and Section 2 of Article XVII of the Constitution, and several California cases, in support of this proposition.

Section 17 of Article IV, is in these words: "Each law enacted by the Legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be revised or amended by reference to its title only; but in such case, the Act as revised, or section as amended, shall be reenacted and published at length."

Now, as the sections amended are reenacted in full and so appear on the statute book, we do not see what application this section can have, or what light it can throw on the Act as amended. The form of the Act is this: After giving the title of the Act and enacting clause, it proceeds as follows: "Section 1. Section 120 of said Act is amended so as to read as follows." Then follows in full the section as amended. After this, comes "Section 2. Section 121 is amended so as to read as follows."

Then follows in full the section amended. And in this way the Act proceeds until six sections of the former Act, which are designated by their numbers, are altered and reenacted.

Then comes the seventh and concluding section of the amendatory Act, which is as follows: "Section 7. This Act shall take effect and be in force from and after the first (1st) day of April, eighteen hundred and sixty-five, (1865) and shall not be construed to have reference or application to any contract made prior to the time herein specified." As the last section clearly provides that this Act shall have no reference or application to contracts made prior to April, 1865, the question arises whether any law on the subject of attachments does or can exist, affecting such contracts. If we look to the statutes of 1861, we find a law providing for attachments to secure debts in certain cases. Does that law still have any vitality? In express terms, it has never been repealed. But certain sections of that law have been amended, and those amendments substituted for the former sections, so that in effect

the former sections have been totally abrogated, from and after the time the amendments took effect.

The amendatory Act was approved and became a law on the fourth of March, 1865, but provides, by its own terms, it is not to take effect until the first of April following.

Now, it is clear that although the substitute sections passed in March, the old law remained in force until April.

But further, the new law provides it is not to be construed "to have reference or application to any contracts made prior to the time herein specified."

If the Legislature could provide that the new sections should not take effect for any purpose until nearly a month after the Act was passed, (and we think there is no question on that point) could it not provide that they should never go into effect, so far as to affect the remedy concerning former contracts? We see no serious objection to such an exercise of legislative power. We think that the language used, taken in connection with the object of the amendment, clearly indicates that it was the intention of the Legislature that the law, as passed in 1861, should still be in force as regards all contracts made prior to 1865. The law of 1861 only gave the benefit of attachment when fraud was committed or contemplated. That of 1864-5 extends the benefit of attachment to a very numerous class of contracts where no fraud or unfairness is charged. It is hardly to be presumed that whilst the Legislature gave this harsh remedy against the honest debtor, it was the intention to entirely exempt the fraudulent debtor from its operation. The second section of Article 17, is as follows: "All laws of the Territory of Nevada, in force at the time of the admission of this State, not repugnant to this Constitution, shall remain in force until they expire by their own limitations or be altered or repealed by the Legislature." This does not mean if a Territorial law is altered in any of its sections, it shall entirely cease to have any validity, but simply that all such laws shall remain in force, except as repealed, and subject to such modifications as are effected therein by the Constitution or subsequent legislation. It does not affect the question under discussion.

We think the attachment law of 1861 remains in force as to debts contracted prior to April, 1865.

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But even if that were not the case, the writer of this opinion is satisfied it would make no difference. The bond, by its recitals, admits that the goods to be released were under attachment, and I think that admission conclusive and not to be questioned, unless the bond was void or voidable for fraud, infancy, duress, or some other defense to be affirmatively shown.

The second point made is, that the bond was void for want of the proper stamps; that it is not a sufficient objection to say it "was given in a legal proceeding;" but that to dispense with the stamps, it should appear that it was "*required* in a legal proceeding." We are satisfied that, in the sense in which that word is used in the Revenue Laws of the United States and of the State, it was "*required* in a legal proceeding." Counsel for the appellants admit that the affidavit and undertaking, preliminary to the issuance of a writ of attachment, are *required* to be given in a legal proceeding, and are therefore exempt from stamp duties; but contend that a bond for the release of property attached is not *required* in a legal proceeding, because the defendant can just as well make his defense to the action while the attached property remains in the hands of the Sheriff as after he has had it returned to him on the execution of a proper bond. Therefore, such bond is not *required* in the legal proceeding.

We must confess that we fail to see the distinction. It is true, the defense to the action might be made without the return of the property. It is equally true the plaintiff could obtain his judgment without the issuance of his attachment. But in the case of plaintiff, the judgment obtained without the attachment might be valueless. On the other hand, if the defendant had a good defense, he might still be ruined in his business pending the litigation, for want of his property, which was tied up by attachment. We think where the Statute exempts bonds "*required* in legal proceedings," it is not restricted to those bonds without which a suit cannot be prosecuted or defended; but it refers to all bonds given in the course of a legal proceeding, and which may be required to give either party an advantage or privilege to which he would be legally entitled in such proceeding by executing a proper bond.

The third point made by petitioners is that this Court holds in its former opinion that the order dismissing the attachment was in evi-

dence for a special purpose, and if so, it was in evidence for all purposes, and so showed the attachment was discharged; and, therefore, that the action in this case could not be sustained.

In this assumption we think the petitioners are entirely wrong. Mr. Justice Brosnan, one of the members of the Court who concurred in the original opinion, expressly held no such proof was before this Court. The writer of this opinion, in several portions of the former opinion, expressed the idea, I think, very clearly, that defendants had *not* offered that order in evidence. The only expression in that opinion which could be construed differently is shown in the words italicised in the following quotation:

“In other words, the defendants would seem to have claimed that the record in *Bowers v. Atkinson* should not be produced piecemeal; but if offered, must be offered as a whole; and if the record, considered as a whole, failed to sustain plaintiff's action, no part of it should be received in evidence. The statement does not show that there was an affirmative attempt, on the part of the defendants, to introduce this order in evidence on their side. *At best, if offered in evidence by defendants, it was only for the special purpose of showing the other papers offered should be rejected.*”

Now, we are not disposed to go into a verbal criticism to show whether the sentence italicised was, or was not, properly worded. But what we do say is this, that if a plaintiff in an action produces on the trial of a case a bundle of papers which were filed in another case, and selects out of that bundle certain papers, which he offers in evidence, and the defendants should object to admitting those selected papers unless the plaintiff would introduce all the papers in the bundle, this would not be equivalent to offering and introducing all the other papers in the bundle on the part of defendants.

Those other papers could not be held as introduced on behalf of defendants, unless they were specially offered and admitted by the Court. The fact that the Judge before whom the case was tried, may have read these latter papers before determining to admit those offered by the plaintiff, would make no difference. If one party offers a paper in evidence to which the other objects, the objecting party, as a matter of course, passes the paper to the Judge for inspection, in order that he may determine the validity of the objection. This might, perhaps, be said to be putting the paper in evi-

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dence for a special purpose ; that is, for the purpose of determining its validity as proof of facts set out in the paper.

But if the Court should reject the paper as not being competent proof of any fact in favor of the party offering, the party objecting could not resort to the same paper as proof of any fact in his favor. That is the case here. If the order dismissing the attachment was produced to the Court, it was only submitted for inspection to show the impropriety of admitting other papers, not to prove any distinct or affirmative fact for defendants, and cannot be considered as having been in evidence.

A re-hearing is denied.

JOHN W. KELLER, RESPONDENT, v. H. G. BLASDEL,
APPELLANT.

A complaint cannot be altered in a material part thereof without notice to defendant. Especially it cannot be so altered as to set out a new and distinct cause of action.

Where there has been a decision of this Court to the effect that one of several defendants in the case made by plaintiff cannot be held either severally or jointly with the other defendants, and upon the case being called again in the lower Court, the plaintiff so amends his complaint as to dismiss as to all other defendants, and make a case against the defendant who had previously been held not liable, and then proceed to trial in his absence, this is such surprise as to entitle that defendant to a new trial.—Per BEATTY, J.

APPEAL from a judgment of the First Judicial District, Storey County, the Hon. RICHARD RISING presiding.

The facts in the case are sufficiently stated in the Opinion.

Williams & Bixler, for Appellant, made the following points :

The District Court had no jurisdiction of this case, because it had been appealed to the Supreme Court, and no remittitur from this Court had been filed in the District Court. The remittitur consists of a copy of the judgment and opinion of this Court. A copy of the judgment in this Court not accompanied by the opinion is not a remittitur.

It was error, after amending the complaint, to proceed to trial

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without service or notice of that amendment. (Sec. 43, Practice Act; *People v. Woods*, 2 Sandford's S. C. N. Y. Reports, 652; *Aikin v. Elliott*, 14 How. P. R. 339.)

A new trial should have been granted on the ground of surprise.

Taylor & Campbell, for Respondent.

Opinion by BEATTY, J.

This was an action of assumpsit, brought originally against H. G. Blasdel, John Paul, Doctor Pinkerton, — Prince, John Doe, and Richard Roe, known as the Building Committee of the Methodist Episcopal Church.

It was tried in the Court below, and a judgment rendered against H. G. Blasdel and — Prince. An appeal was taken from that judgment, and from an order refusing a new trial. The evidence in this case was brought up to this Court. The principal evidence in the case was that of the plaintiff, Keller. This Court reversed the judgment of the Court below, and sent the case back for further proceedings.

According to the opinion of this Court, the evidence of plaintiff did not tend to make out any case against Blasdel, but clearly negatived his liability. The case made by plaintiff's own statement showed that if anybody was liable to him it was the Building Committee of the Church, who, according to his statement, were to sign a written contract, but did not sign the same. That committee, or at least the parties who were to sign the contract, were Paul, Deal, Prince, and Anthony. Blasdel was not one of them. Then, under the facts as stated by plaintiff himself, and the opinion of this Court, there never could be a joint judgment against the Building Committee (or those who were to sign the contract) and Blasdel.

The plaintiff might, according to the opinion there expressed, get a judgment against the committee if he could prove some additional facts to those sworn to on the first trial; facts which would in no way have been inconsistent with those facts he had sworn to on the first trial. To obtain, however, a judgment against Blasdel, he must prove facts inconsistent with those sworn to on the first trial.

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Under this state of the record, a certified copy of the *judgment* in this Court was taken to the Court below ; the case was put on the calendar, set for trial, and called up in its regular course. When called, neither Blasdel nor his counsel, nor indeed any of the defendants, were present. The plaintiff moved to amend his complaint so as to strike out the names and description, etc., of all other parties except H. G. Blasdel. The Court gave leave to make the amendment ; it was made, and the plaintiff proceeded to trial, and obtained judgment.

Blasdel got notice through third parties that the trial was progressing, not in time to make any defense in the case, but in time to make a statement on motion for new trial.

The motion was made and overruled, and he appeals to this Court. There are a number of grounds stated why a new trial should have been granted. It will not, we think, be necessary to notice more than two of them.

The appellant complains, and we think justly, that the complaint was amended in a material matter without notice to him. When a party is sued he is only required to answer the complaint served on him ; he is not expected without further notice to answer a totally different and distinct cause of action. Blasdel was sued on an alleged joint cause of action against himself and others. He may have been satisfied that defendant would never prove such joint cause of action whether he was or was not present. Or he may have been willing that a joint judgment should go against himself and others to be first made of the joint property, but by no means willing to risk an individual judgment against himself without being present to defend.

It was totally irregular to thus amend the complaint without notice, and when neither he nor his counsel were present. We think, too, the appellant was fairly entitled to a new trial on the ground of surprise. According to the former opinion of this Court, and the case made out by the plaintiff's own testimony, it was evident the plaintiff could only recover against the committee who were to sign the contract, if against anybody. The appellant then had a just reason for supposing the case would not be prosecuted against him. He had a right to suppose, either that the case would

Miller v. Cherry *et al.*

be dismissed, or so amended as to be prosecuted against those who were to have signed the contract, and none others.

We do not think appellant was quite as diligent in attending to the case as he should have been; but it would be a very harsh application of the rules of law which would thus punish a slight want of diligence by sustaining a judgment obtained under circumstances so suspicious and indicative of fraud. Appellant certainly had no right to expect the plaintiff would so far refresh his memory about old and past transactions as to be able to make out a case against him when his former testimony had negatived any such case; or, indeed, to suppose he would try to make out a case entirely at variance with his former statement.

The case is reversed, and a new trial granted.

By LEWIS, C. J.

I concur in the reversal upon the ground of the amendment of the complaint without notice.

GEORGE MILLER, RESPONDENT, *v.* D. W. CHERRY ET AL.
H. GLAUBER, ONE OF DEFENDANTS, APPELLANT.

A direction in a foreclosure decree to sell mortgaged property for gold coin only, is injurious to one holding a subsequent lien, and such subsequent lien-holder may appeal from the judgment and have it reversed.

There being nothing in the record on which this Court could act in setting aside the alleged sale under an erroneous judgment, the appellant must seek his remedy by motion in the Court below.

APPEAL from a decree of the District Court of the First Judicial District, Hon. R. S. MESICK presiding.

The facts are stated in the Opinion.

Corson & White, counsel for Appellant.

Mitchell & Hundley, counsel for Respondent.

Cavanaugh v. Wright.

Opinion of the Court by BEATTY J., BROSNAN, J., concurring.

This was a proceeding to foreclose a mortgage. The appellant was a junior mortgagee, and complains that the decree of the Court directs the mortgaged property to be sold for gold coin. There is no doubt but this form of decree is injurious to the junior mortgagee. If so sold, the property would be more likely to be exhausted before the senior mortgage is satisfied. The judgment must be modified on the authority of *Milliken Brothers v. Sloat*; *Hastings v. Burning Moscow Co.*, and other cases decided in this Court. The Court below will correct the decree by striking therefrom all those portions which direct that any of the mortgage debts be paid in gold coin, and all those portions directing the Sheriff to sell for gold coin, and have the decree to read for so many dollars and cents, without designating the kind of money in which it is to be paid. The appellant must recover his costs in this Court.

In other respects the decree of the Court below will stand affirmed.

We are asked to make an order setting aside the sale made under this decree. There is nothing in the record on which we could base such an order. If the appellant is entitled to such relief, he must seek it by an appropriate motion in the Court below.

3	106
4	124
14	483
14	436

2	106
26	356

PETER CAVANAUGH v. SAMUEL H. WRIGHT.

PETITION FOR MANDAMUS.

Under the provisions of Section 8, Article VI, of the Constitution, the Legislature may prescribe the mode of proceeding on appeal from a Justice's Court to the District Court. That mode may be by trial *de novo*, or a mere review of the Justice's proceedings, as the Legislature choose to direct.

THIS was a petition for Mandamus from this Court directed to the Hon. S. H. WRIGHT, District Judge of the Second Judicial District.

The facts are fully stated in the Opinion.

R. M. Clarke, counsel for Petitioner.

A. C. Ellis, counsel for Respondent.

Opinion of the Court by BEATTY J., LEWIS, C. J., concurring.

In this case the petitioner, Peter Cavanaugh, was sued in a Justice's Court, and judgment rendered against him. He took the necessary steps to perfect an appeal to the District Court according to the provisions of an Act of the Legislature of the State of Nevada, approved February 26th, 1866, prescribing the mode of proceedings in Justices' Courts, and regulating the manner of taking appeals, &c.

The Act directs that trials on appeal from Justices' Courts shall be *de novo* in the District Court. When this case came up for hearing in the District Court, it was objected that the Constitution did not confer on the District Court, nor empower the Legislature to confer on that Court the right to try *de novo* a cause that had been tried in an inferior Court. That under the Constitution of the State the District Court only had power to review as upon writ of error the action of the lower Court.

The District Court sustained this view of the Constitution, and refused to proceed with the trial of the appeal, upon the ground that the Court had no constitutional power so to do, and that the Act of the Legislature authorizing trials *de novo* is unconstitutional and void.

This Court is now asked to issue a mandamus to the District Judge commanding him to proceed with the trial of the cause, and the only question raised on the argument of the cause was whether that Court had the power under the Constitution to hear the cause *de novo*. The only clauses of the Constitution bearing directly on this point are as follows: Section 6 of Article VI, in enumerating the powers of the District Court uses this language:

"They shall also have final appellate jurisdiction in cases arising in Justices' Courts, and such other inferior tribunals as may be established by law."

Section 8 of the same article, after defining the cases in which Justices shall have original jurisdiction, uses this language:

"The Legislature shall also prescribe by law the manner, and determine the cases, in which appeals may be taken from Justices' and other Courts."

"Appellate jurisdiction," in its most limited and technical sense,

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means jurisdiction to retry and determine something that has already been tried in some other tribunal.

If we were to give the phrase its most technical and limited meaning, we might rather hold that the framers of the Constitution intended thereby to require that all appeals from Justices should be tried *de novo*, than that none should be so tried.

But we are not disposed to give it so narrow and technical a construction. We think as used in the Constitution the phrase "Appellate jurisdiction" was intended to be used in a broad and comprehensive sense. It was intended to confer jurisdiction upon the District Courts to hear cases on appeal either in the strictest sense, which would require a trial *de novo*, or to review them as law cases are reviewed at common law. We think the language quoted from the eighth section clearly confers on the Legislature the power to regulate the manner of appeals to the District Court. It might require in one class of cases that upon appeal the trial should be *de novo*, and in other cases a simple review of the proceedings of the Court below.

The Legislature has required the trial in the District Court to be *de novo* in all cases, and we think it had the right to do so; the law is not in conflict with any constitutional provision. We see nothing in the fourth Section of Article VI of the Constitution, which confers Appellate Jurisdiction on this Court, which militates against the views we have herein expressed.

The District Court of Ormsby County will proceed to hear, try, and determine the cause of *Catharine A. Harvey v. Peter Cavanaugh* in the regular course of business of said Court.

The trial will be *de novo*.

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2 180
3 338

BULLION MINING COMPANY, RESPONDENT, v. THE
CRÆSUS GOLD AND SILVER MINING
COMPANY, APPELLANT.

If a plaintiff, pending a suit in ejectment against several defendants, each in possession of distinct parts of the property sued for, sells out to one of the defendants, the controversy as to that defendant is ended, and he may under his purchase prosecute the same suit against the other defendants for such portion of the property as they hold.

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In such case the purchaser, being substituted as plaintiff, cannot amend his complaint so as to include other property claimed by himself under a different title.

When an action has been brought in due time for one piece or portion of property, it would be bad practice to allow the complaint to be so amended as to include another piece of property which would otherwise be protected from recovery by the Statute of Limitations, and thus embarrass the defense under that statute.

When an undivided portion of a tract of land is recovered, the Sheriff would not be justified in entirely expelling the tenants who are in possession, if they make no opposition to a joint or common possession by those recovering the judgment.

All tenants in common, under our statute, may unite in prosecuting an action for possession of the common property. So one tenant in common may sue for his share. But whether more than one and less than all may sustain such an action: Query.

When a suit is brought for a blind ledge or lode bounded by walls found at the depth of two hundred feet below the surface, the ledge only and no part of the surface can be recovered.

When a miner locates a portion of the surface, and also a lode or ledge following its dips, angles, and spurs, he may have his Common Law judgment for the surface, and also a judgment following the lode under other public lands.

When a ledge located as such comes to the surface, the locator may recover the surface, provided the outline of the ledge is visible on the surface.

The common law doctrine, that he who possesses the surface of the earth owns all to the center of earth, is greatly modified as to the rights of miners and others on the public lands. One may be entitled to the occupancy of the surface, another to the veins of mineral running under the same land.

The Sheriff has no authority to put a party in possession of land not described in complaint or judgment.

The fact that plaintiff recovered a vein or lead gives it no right to hoisting works erected for the purpose of taking ore from that vein, unless it also had recovered the surface on which the hoisting works were erected.

APPEAL from a judgment rendered in the District Court of the First Judicial District, Storey County, the Hon. RICHARD RISING presiding.

Charles E. DeLong, for Appellant, made the following points :

The demurrer should have been sustained to the original action, because it was brought by a part only of the tenants in common. (See *Johnson et al. v. Supelveda*, 5 Cal. 149.)

The extraordinary latitude allowed in amending this complaint—in allowing a defendant to be substituted for the plaintiff, in allowing the amount of property sued for to be increased in the amended

complaint, the description of property altered, etc.—is entirely without precedent, and erroneous. More especially was it erroneous as to this appellant, who had no notice until after the amendments were made.

By the action of the Court, appellant was deprived of proper time to answer—deprived of the defense arising upon the Statute of Limitations as to seven hundred and fifty feet of ground—and deprived of the defense arising from the fact that part only of the tenants in common had sued.

As to power of Courts to allow amendments, see *Davis v. Mayor of the City of New York*, 4 Kernan, 526; and *Wright v. Straus*, 3d Code Reports, 138, 3d Duer, 647, and 4 Johnson, 483.

The judgment being merely for the ledge or vein, the Sheriff could not deliver possession of land and houses not described in the complaint or judgment.

Williams & Bixler, for Respondents, made the following points :

Although the suit was originally brought by tenants in common only representing 875 feet out of 1,600 feet, still they were entitled to recover the whole 1600 feet as against appellant, a mere trespasser. (See *Collier v. Corbett*, 15 Cal. 183; *Knox v. Marshall*, 19 Cal. 617; *Touchar d v. Crow*, 20 Cal. 150; *Clark v. Huler*, 20 Cal. 196; *Hart v. Robertson*, 21 Cal. 346; *Rowe v. Bacigalupi*, 21 Cal. 633; *Maloney v. Van Winkle*, ib. 583.

There was no demurrer for *nonjoinder of parties*.

The demurrer was waived by answering to the merits.

The action was properly brought by tenants in common. Such tenants may unite in an action for recovery of real estate (*Alford v. Dewin*, 1st Nev. 207.)

The substitution of the Bullion Company as plaintiff was properly made under the provisions of Section 16 of the Practice Act.

This substitution could not deprive the defendant of the right to plead the Statute of Limitations.

The hoisting works were within the vein walls, and therefore recovered and embraced within the judgment for the vein or lode.

The works were erected on vein matter, immediately over the compact ledge, and erected for the express purpose of hoisting the

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ores from the ledge, and connected with the ledge by a perpendicular shaft.

These works were appurtenant to the vein, and a part of the realty as such. (See *Merritt v. Judd*, 14 Cal. 59.)

Opinion by BEATTY, J., full Bench concurring.

On the 20th of November, 1863, Theodore Winters and some seven others, plaintiffs, filed a complaint against the Fairview Mining Company, the Croesus Mining Company, the Bullion Mining Company, the Minerva Mining Company, the Superior Mining Company, the Alpha Mining Company, and The Four-Twenty Mining Company, seeking to recover an interest in a certain mining claim, consisting of an "equal undivided eight hundred and seventy-five feet" in a claim described as "The Cosser & Co.'s claim." * * "Beginning on that certain gold and silver bearing quartz ledge in said district called the Comstock ledge, at the southern boundary of the claim formerly called the Webb and Kirby, and now known as the Chollar claim, and extending thence south along and following said Comstock ledge, with all its dips, spurs, and angles, a distance of 1,600 feet, * * and extending on each side of said ledge 100 feet."

The present appellant first demurred to this complaint, and, on the demurrer being overruled, answered, and then, by leave of the Court, put in a supplementary answer by way of amendment to the original answer.

Most, if not all, the other companies sued have put in some defense, but their answers are not material, as it regards the determination of the points before us.

No action is shown by the record to have been taken in the case after the answers filed, until the evening of the 12th of May, 1865, when a part of the defendants were served with notice, affidavit, copy of amended complaint, etc.

The notice was to the effect that the plaintiffs, next morning at ten o'clock, would move the Court to dismiss the complaint as to the defendant, the Bullion Company, make an order allowing the Bullion Company to be substituted as plaintiff, and also allowing an amended complaint to be filed by the Bullion Company.

At ten o'clock, those defendants who had been served with notice

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came into Court and protested against the hearing, on the ground that the notice was insufficient, and appealed to a rule of the Court requiring five days' notice of motions of this character.

The Judge observed from the bench he would shorten the notice, and ordered the motion to be heard at two o'clock that day. At two o'clock the motion was heard and sustained.

After the order was made as above stated, a notice was then served on the present appellant that the Court would be asked to make the orders, which, in fact, had already been made. The bill of exceptions says this notice was served on the appellant on the afternoon of the 16th of May. This date is evidently a mistake, because it is inconsistent with other statements in the same bill of exceptions.

It must have been served on the appellant after the 13th and before the 16th; probably on the afternoon of the 15th. At the opening of the Court on the 16th the motion was called up and sustained. This was in effect only ordering that the appellant should be bound by the order which had already been made upon notice to other defendants.

The appellant protested against the whole proceeding as irregular, and calculated to deprive it of a fair opportunity of defending its rights in the case, and excepted to the ruling of the Court.

The Court ordered appellant to file its answer to amended complaint the next morning, (the 17th of May) although they had never been served with copy thereof. On that morning the answer was filed, and the trial of the cause proceeded.

The amended complaint is not for an undivided interest of 875 out of 1,600 feet, but for the entire claim known as the "Cusser claim," more particularly described as follows: "Sixteen hundred feet in length upon that certain quartz lode known as the Comstock lode, being the section of said lode bounded on the north by the claim of the Chollar Silver Mining Company, and extending southerly along said lode, and including all the dips, spurs, and angles thereof, a distance of 1,600 feet of the said lode, being bounded upon the west by a wall of dark green rock, which appears in the working shaft of the Bullion Mining Company, at a depth of about 460 feet, and in the working shaft of the Chollar Company at a depth of about 425 feet, having a dip to the east of from thirty to

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fifty degrees, and running in a general north and south course, and bounded upon the east by a heavy seam of clay selvage which appears at the lower works of the said companies, and lies along the country rock which forms the eastern wall of said lode."

The case went to trial on this amended complaint. The jury found for plaintiff, and judgment was rendered for restitution of the property as described in this amended complaint. After judgment an execution was issued, and the Sheriff put plaintiff in possession of certain hoisting works of the appellant. The appellant contending that the judgment did not embrace these hoisting works, moved the Court for an order to reinstate it in possession of said works. This the Court refused. Appellant appeals from the judgment and also from the order refusing to reinstate it in possession of the hoisting works.

We think both appeals must be sustained. The original complaint was for only 875 out of 1,600 feet, or for an undivided interest of thirty-five sixty-fourths of the whole. This is all the original plaintiffs claimed.

If these plaintiffs sold out to the Bullion Company, doubtless it would have been proper to substitute that company as plaintiff, and allow it to conduct the suit in its own way. We do not see that the fact that the Bullion Company had originally been a defendant could make any difference. Here was a suit for mining ground which seems to have extended over the claims of several companies. If one of these companies, sooner than litigate the suit, chooses to buy plaintiff's claim, it had a right to do so. When that was done, the controversy was settled as to those parties. But in such a case it would not be improper to allow the suit to continue as to the other defendants. But if continued, it must be the same suit, and not a new one. It must be for the property claimed by the original plaintiffs, and not for that property and other property claimed by the new plaintiff, united by a new declaration to that which was originally sued for.

If A were to sue B for a horse, and then assign the cause of action to C, C could not amend his complaint and charge that B had taken the horse from A, his assignor, and taken a yoke of oxen from C, the present plaintiff. Every one would at once see that this was uniting a new and distinct cause of action, arising to C

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alone, with the original cause of action which arose to A. To allow this jumbling together of new and distinct causes of action, originally pertaining to different parties, would lead to much confusion and to no good. We have seen no precedent for such a practice, and cannot believe it justifiable. In this particular case, the reasons for refusing to sustain such a course are still stronger than in the case supposed.

A Statute of Limitations was passed in the latter part of November, 1861, to take effect December 2d, 1861, which limited all actions for the recovery of mining claims to two years after cause of action arose, but said statute not to begin to run against causes of action already existing until after its passage. When the first suit was brought, the statute had not run in any case, and could not be pleaded. This thirty-five sixty-fourths of the 1,600 feet was by the bringing of this suit protected from the running of the statute. But in a few days after the bringing of this suit, the right to sue for the remaining twenty-nine sixty-fourths of this claim may have been barred by the Statute of Limitations.

The appellant claims that such was the case. It certainly had the legal right to try to establish such a defense. It was not good practice to thus mix up two causes of action so as prevent or embarrass such a defense. We mention this as an illustration of one of the many evils resulting from such a practice. If such a practice were allowed, all a plaintiff, who finds himself about to be defeated, has to do to throw the costs on a defendant, is to assign his cause of action to some one who has a good cause of action against the defendant, and let the new party be substituted and unite a new cause of action, which he can sustain, to the old one, which cannot be supported, and thus mulct the defendant in all the costs. Such a practice is without precedent, unjust, and not to be tolerated.

No doubt when a new plaintiff is substituted, he may, like any other plaintiff, amend his complaint, in a proper case, as to mere matter of form, provided it is substantially the same cause of action as that originally set out. The respondent claims that such was the case here; that, although the original complaint was only for an undivided interest of 875 out of 1,600 feet, still, if a judgment had been had under that complaint, the plaintiffs would have been

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entitled to possession of the whole 1,600 against the appellant, a mere trespasser.

Upon this point respondent cites several California cases. Some of those cases establish this proposition, that where a plaintiff sues for a tract of land, claiming that he is entitled to the sole possession thereof, and shows on the trial that he is a tenant in common with others in the land, and that he and his cotenants are entitled to the exclusive possession of the property described, he will be entitled to recover the entire tract against trespassers who hold adversely to him and his cotenants. These California cases all seem to be based on the authority of a case in Day's Reports, to which we have no access. Whether they are sound or not, (of which, possibly, there is some doubt) we have not thought it necessary to inquire. That is not this case. Here the whole possession was *not* sued for. The judgment could be for no more than was claimed. If the plaintiffs had obtained judgment for thirty-five sixty-fourths, we know of no law which would have justified the Sheriff in entirely expelling defendants from possession if they had quietly submitted to a common or joint occupancy by the plaintiff with themselves. We have certainly been referred to no authority on this point, and with our present light must hold such a recovery would only have entitled plaintiff to a common possession with defendants, and those owning the other twenty-nine sixty-fourths might become barred before the trial of the first suit.

For these reasons, we think the amendment should not have been allowed, and that the judgment rendered on that amended complaint is erroneous and must be set aside. If the Bullion Company can recover anything in this case, it can only be the thirty-five sixty-fourths sued for in the original action. This Court has ruled that *all* the tenants in common of an estate may unite in one action under our statute for the possession of the common property. It is not disputed one tenant in common may sue for his undivided fraction. But this Court has never decided, as counsel for respondent seem to think, that more than one and less than all the tenants in common of a piece of land may unite in such action.

This point being one of much difficulty and doubt, we have not thought it necessary to decide, as this case must be reversed on other grounds. In this case the appellants complain, and we think

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not without just ground, of precipitancy and haste in making the order for change of parties, time for filing answer, etc. But, as the judgment is reversed on other grounds, it does not seem necessary to decide whether this undue haste and compulsion on the part of defendants to answer a new complaint, without time for reflection or consideration, would of itself have been sufficient to set aside the judgment.

The action of the Sheriff in putting the plaintiff in possession of the appellant's hoisting works, was a clear and unmistakable trespass. The complaint on which the suit was tried describes nothing on the surface. It describes a *lode* (a Cornish word nearly synonymous with vein) bounded by certain rocks which are found, if we may believe the complaint, only at the depth of several hundred feet below the surface. When found at that depth, they are pitching, says the complaint, to the east at an angle of thirty to fifty degrees. Now, if these rocks are the boundaries of the claim sued for, and the rocks come no nearer the surface than two or three hundred feet, then the vein comes no nearer than two or three hundred feet. For the vein or lode is the matter contained between those two walls; where the walls terminate, there the veins terminate—unless there should be a solid ledge arising from the vein, which supports itself without walls. But counsel for respondent seems to think that in an ejectment plaintiff must recover from the surface of the earth downwards. They seem to think it would be impossible to recover a vein without recovering the surface over the vein. At common law the recovery in actions of ejectment and all real actions, was usually for a portion of the earth's body or substance, somewhat in the form of an inverted cone or pyramid; the surface of the earth recovered being the base of the figure, and the apex at the center of the earth. But the judgment rendered for a ledge, lode, or vein is quite different. It may include a portion of the earth's surface, where that surface has been properly located.

The plaintiff would, in case of a surface location, together with the lode following its dips, spurs, and angles, then be entitled to his pyramid carved out of the earth's body, having its base on the surface and its apex at the center of the earth. But if the lode dipped out of this pyramid, as they nearly always do, he could also have his judgment following this lode (usually in the form of a solid

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parallelogram) wheresoever it might go—at least as far as it might extend under the public lands. But if a party locates a ledge without any location on the surface, he can only recover the ledge.

If the ledge comes to the surface, as is frequently the case, undoubtedly he is entitled to the surface. But that could only be where the outlines of the ledge are visible on the surface.

It will probably be suggested that if a party locating a ledge does not get any of the surface, he cannot get to his ledge, and the location will be valueless. This, we think, is rather an imaginary than a real difficulty. Nearly all ledges diverge more or less from the perpendicular. The owner has the opportunity of working them from a great many different points. There would generally be no difficulty in finding some accessible point from which the vein might be reached that is not occupied. If all such points are occupied, then he must, like anybody else, buy what he wants.

If we were to hold that a party locating a blind ledge (one which does not show itself on the surface) must have a certain portion of the surface to work his ledge, where are we to give it to him? Nearly all ledges diverge more or less from the perpendicular. Frequently neither a ledge nor the wall rock inclosing veins or lodes reaches to the surface by many feet—sometimes by many hundred feet. Now, if we are to extend such veins to the surface, where no particular surface ground has been located, what rule are we to follow?

If the walls are first found at a depth of two hundred feet below the surface, and at that depth have a dip of forty-five degrees, shall we ascend from the top of the wall rock by perpendicular lines to the surface, and give the ground included between those lines thus produced to the holder of the ledge, or are we to extend imaginary lines from the top of the wall rock to the surface at an angle of forty-five degrees, and give to the ledge-holder the ground between those two lines? It is evident there would be a difference of two hundred feet in the location of the two pieces of ground. To adopt either rule would be to endanger the improvements of others who might erect buildings in ignorance of the true location of the ledge. Sometimes ledges change their dip. At one time they may lie nearly flat, at another they may be nearly perpendicular. Sometimes the same ledge, as is claimed in this place, may dip to the west; then, at a certain depth, change and dip to the east. It

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would be impossible to adopt any sensible and practicable rule for extending to the surface the location of ledges or lodes that are located merely by name as extensions of known or marked ledges, where those locations show no croppings or indications on the surface. It is as necessary in every mining locality to have houses for boarding in, mechanics' and traders' shops, etc., as it is to have mines. They are as worthy of protection as the mines themselves. We cannot adopt any rule that will sacrifice the houses and shops of one class of citizens, to promote the interest of another.

Whilst we depart from the rules of the common law so far as to let the miner follow his lode of quartz wheresoever it may go, even though it runs under public land which was in the occupancy of another before the mine was located ; on the other hand, the occupier of the surface is equally entitled to protection in the use of that surface, if a miner having a senior location should in the course of time be found to run under his improvements. The doctrine of the common law, that he who has a right to the surface of any portion of the earth, has also the right to all beneath and above that surface, has but a limited application to the rights of miners and others using the public lands of this State. Necessity has compelled a great modification of that doctrine. The departure from those old and established doctrines of the law will, doubtless, lead to many complications. To adhere to the common law rules on this subject is simply impossible. To attempt to carry out common law doctrines on this point would either give all the houses in Virginia to the mining corporations, or else all the most valuable mines to those occupying the houses. The well established custom of miners to locate veins of mineral, claiming to follow them with all their dips, spurs, and angles, without reference to the occupancy of the surface, has compelled a departure from common law rules.

In this particular case, a shaft sunk in the hoisting works, which are the subject of controversy, penetrates the eastern wall rock, passes through it, and reaches the vein at the depth of about two hundred and fifty to two hundred and fifty-five feet. At this point the vein is dipping to the east at an angle of forty-five degrees. The eastern wall rock is, of course, pointing toward a spot on the surface (supposing the ground to be level) some two hundred and fifty feet west of the disputed property. Consequently, if the wall were

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continued, the most easterly portion of the vein would be over two hundred feet west of the hoisting works. If the eastern wall breaks off at any point above or west of where the shaft is sunk, whether a shorter or longer distance, the hoisting works are still in any event east of that portion of the land lying perpendicularly over the vein where it comes nearest the surface.

But, say respondents, the vein, where it gets to within two hundred feet of the surface, changes and has a downward dip to the west, instead of to the east, as it does at a depth of two hundred and fifty feet. That seems to be the general theory among miners in regard to the Comstock lode. But there is no evidence that such is the case at this particular point of the vein. There is no evidence here of wall rocks approaching the surface nearer than two hundred and fifty feet of the surface. The only croppings of the ledge spoken of in the testimony are eight hundred feet from the hoisting works.

The surface of the ground on which these works are situated is not described in the complaint, the judgment, or execution.

The Sheriff had no right to meddle with these works, because the plaintiff's lawyers, witnesses, or somebody else supposed that if certain wall rocks run where, according to their theory, they ought to run, this piece of land would be within those walls.

Respondent makes an argument to prove that hoisting works are a part of the freehold on which they stand; that these hoisting works were erected especially to work this mine or lode, and therefore appurtenant to the mine, and must go with it. That the hoisting works belong to the realty, and must go with the land on which they stand, we certainly believe to be a correct proposition. If the plaintiff was entitled to recover the land on which they stand, then it was entitled to have the works. If it could not recover the land, it could not recover the works. How the intention with which the works were erected could influence the plaintiff's right to recover the land on which they stand, we are at a loss to comprehend.

If plaintiff is entitled to recover these hoisting works because they were erected to hoist ores from this mine, it would, upon the same principle, be entitled to recover an assay office in Virginia City, or any other place in Storey County, if one was erected there to assay ore from this mine. The object for which the works were erected

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has nothing to do with the question as to who is entitled to the ground on which they stand.

The judgment of the Court below must be reversed. The plaintiff will be allowed either to dismiss its action, or to move the Court to reinstate the pleadings as they stood before the order was made allowing the amended complaint to be filed.

The Court will also make an order directing the Sheriff to reinstate the appellant in possession of the hoisting works from which it was ejected.

RESPONSE TO PETITION FOR RE-HEARING.

A tenant in common suing for only a part interest in the property cannot recover judgment for the whole.

This Court will not sanction a practice which is unprecedented and calculated to produce complication, and result in injustice, merely because it may be shown that the counsel of complaining party might, by the exercise of great astuteness and readiness, have guarded against the threatened injury.

The fact that hoisting works are erected by a trespasser over a vein of ore, and for the purpose of hoisting that ore, does not give the owner of the vein any right to those works, unless he also is owner, or is entitled to the possession of the very soil on which these works are erected.

Opinion by BEATTY, J., LEWIS C. J., concurring.

Response to petition for re-hearing.

The first point made by respondents in their petition for re-hearing is, that this Court erred in supposing that the original suit was only for eight hundred and seventy-five feet of ground and not for 1,600 feet. After a careful examination of the original complaint, it still seems apparent to us the suit was for only eight hundred and seventy-five feet.

The complaint avers substantially that plaintiffs and their predecessors were in 1859 the owners of, and in the possession of eight hundred and seventy-five feet, undivided interest in a certain mining claim called the Cosser claim, which claim is more particularly described (here follows the description of a claim of 1,600 feet). That subsequently defendants entered on said claim and ousted plaintiffs therefrom, and then winds up with a prayer for the possession of the "mining grounds aforesaid."

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The "mining grounds aforesaid" might mean those of which plaintiffs had been in possession, to wit: eight hundred and seventy-five feet, or it might mean the whole 1,600 feet. But the gist of the complaint, the very wrong complained of, is that the defendants ousted plaintiffs; ousted of what? Why, doubtless, of eight hundred and seventy-five feet, in possession of which the plaintiffs had been.

There is no allegation in the complaint that plaintiffs were ever in possession of more than eight hundred and seventy-five feet, or that they ever had the right of possession to more.

One tenant in common may be in possession of the entire common property.

If in such case he be ousted by a trespasser who is a stranger to the title, we see no reason why, upon a proper complaint, he may not recover the entire premises from the trespasser.

But if he wishes to recover the whole, he must allege his possession of the whole and ouster therefrom; or other facts clearly showing his intention to sue for the whole, and his right to such recovery.

Here there was nothing of the kind, and under the original complaint no recovery exceeding eight hundred and seventy-five feet could have been had.

Then, to amend the complaint so as to seek to recover 1,600 feet, was so to amend it as to introduce a new cause of action.

But, argues respondent, even if it was introducing a new element into the suit, and the Court below erred in so allowing, this error should be disregarded unless it produced, or reasonably might have produced, some detriment to the other side. And in connection with this proposition, petitioner asserts two secondary propositions: first, that if the action as to seven hundred and twenty-five feet was barred by the Statute of Limitations, that statute could have been pleaded to this part of the action embracing the seven hundred and twenty-five feet as readily as if there had been a separate action therefor; and secondly, that no such plea could have been successfully introduced in this case, even if a separate action had been brought for the seven hundred and twenty-five feet.

To the first of these secondary propositions, we say the law may be as stated by counsel. Possibly, if defendants had been allowed

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time, their counsel might have found an authority for interposing the plea of the Statute of Limitations as to seven hundred and twenty-five feet. Yet it must be admitted that it is a complicated and not well settled question. The circumstances of this case, as far as shown in the record, indicate that if a separate action for the seven hundred and twenty-five feet had been brought, that plea might have been successfully interposed. Hurried as counsel for defendants were in this case into their defense, they failed to interpose that plea, and a recovery is had against them, which probably never could have been had under more regular proceedings.

This Court cannot sanction such irregular, unprecedented and dangerous practices merely because there is a possibility that counsel on the other side may by great astuteness and readiness be able to ward off threatened dangers. The proceedings in Courts of justice should be as much simplified and as little complicated as possible. Such a practice as was indulged in in this case must inevitably lead to confusion, complication, uncertainty and injustice.

As to the other proposition, that the Statute of Limitations could not have been successfully interposed in this case, we confess that we are totally at a loss to comprehend the reasoning of the counsel.

Counsel state that the original plaintiffs, Winters and others, claimed under the Cosser title; that the defendants claimed under the Buchanan & Smith location. That the possession of one tenant in common inures to the benefit of all his cotenants, etc., and asks: "If Winters and others were in the actual possession in the proportion of eight hundred and seventy-five to 1,600 undivided of each and every inch of the ground, how is it possible for the Cœsus Company to have been at the same time in the actual peaceable possession of any part of it under an adverse title?" * *

"If Winters and associates were in possession as alleged, and as found by the jury, of the premises in dispute, that possession was good for the other owners—unless adverse to them, of which there is no pretense—and would inure to their benefit. As long as Winters and associates so remained in possession there could be no ground for a plea of the statute by the defendant against their cotenants."

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From this language one would suppose that Winters and other plaintiffs had always been in possession of eight hundred and seventy-five feet of the ground sued for.

But the plaintiffs' complaint only avers that they were in possession in June, 1859, and remained in possession until ousted by plaintiff on the — day of —, 1863. The amended complaint was filed in May, 1865.

Now, if the ouster took place in the early part of May, 1863, or prior to that time, then Winters and his coplaintiffs had not been in possession of the eight hundred and seventy-five feet for more than two years, and there was no reason why the statute should not have run against the seven hundred and twenty-five feet.

Taking the original complaint as literally true, it does not negative the idea that the ouster was prior to May, 1863. But it is not unusual for lawyers to allege the ouster to have taken place just before the suit is brought, although, in fact, it may have been several years previous.

Whilst we have nothing positive in the record showing when the ouster did take place, if indeed there ever was an ouster, the facts that much work had been done and valuable improvements put on defendants' claim would indicate that the ouster, if any, took place several years prior to November, 1863, when the original suit was brought. Certainly, the finding of the jury did not prove that Winters and his coplaintiffs were in possession of eight hundred and seventy-five feet when they brought their action. If they were, we don't comprehend why they brought suit.

The next point which the petitioners seek to have reviewed is our decision as to the hoisting works. Petitioners urge that the hoisting works were between the walls of the vein, and attempt to show it in this way. They say the shaft connected with the hoisting works is entirely in *vein matter* from the top down, as shown by Mason, a witness for the defendants, and then put their argument in this form :

“ Every vein must necessarily have, and has, two walls, and all matter embraced within those walls and denominated ‘ vein matter,’ is a part of the vein. The hoisting house and machinery was upon, and the entire shaft in, vein matter. Therefore they were between the walls of the vein or ledge.”

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By the same process of reasoning, it may be proved that a man is a horse. Every man is an animal, and every horse is an animal: therefore every man is a horse.

Admitting that every vein has outside walls, and all matter between those walls is vein matter, it certainly does not prove that all *vein matter* is contained between two walls. Vein matter may certainly be removed from between its original walls either by artificial or natural means, and after such removal, it does not cease to be vein matter. When we say that certain substances are vein matter, we may mean that those substances are now a component part of some mineral vein, or that at some past time they did constitute a part of the substance of some vein. It is well known that what miners call *vein matter* frequently rolls down a mountain side to a great distance from its original location in the vein. By the action of water it is carried to still greater distances. The hoisting works in this case were on the side of a mountain.

They may have been on vein matter which had rolled down the mountain for an indefinite distance. There is certainly no satisfactory evidence to show those works were within the walls of the ledge sued for, and, therefore, the Sheriff, under a judgment for a quartz ledge, had no right to interfere with those works.

The fact that the original complaint sues for the ledge and two hundred feet on each side of it can make no difference. The case was not tried on that complaint; therefore, the first complaint has nothing to do with the question. This Court only decided the Sheriff had no right under that particular judgment to interfere with defendants' hoisting works. It did not decide what would be the effect of a judgment for the lode and two hundred feet on each side thereof. That is a question not now before us.

Petitioners again go into a long argument to show that the use to which a thing is put may determine whether it is or not a fixture.

Admitting the proposition to be true, we do not see its applicability to this case. A large building erected on the soil with steam engine, etc., for hoisting ores we fully admit to be a fixture. But a fixture to what? To the soil on which it stands. The difficulty with plaintiffs here is, not that they failed to show that such a building was a fixture, (we are not aware that any one disputes that) but they failed to show any right of possession to the soil on which the build-

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ing stands. If plaintiffs were entitled to the soil on which this building stands, they would have been entitled to the building if it had been erected to grind corn.

If they were not entitled to recover the soil, they could not recover the house standing thereon, although it was erected for the purpose (unlawful, perhaps, if you will) of taking ore from plaintiffs' mine. The purpose for which a house is erected cannot change its locality. Nor can we see how that purpose is to affect in any way the rights of plaintiffs to recover the ground on which it stands.

The petition for re-hearing is denied.

C. GOTTSCHALL ET AL., APPELLANTS, v. G. MELSING ET AL., RESPONDENTS.

A miner appropriating a piece of the public domain for mining purposes has a right to the exclusive possession of the ground so taken up.

A miner cannot by mere notice take up a piece of mining ground and hold it for five years without work or occupation; especially, when there is not even an intention to work it, except on the happening of a very uncertain event.

Under some circumstances lapse of time is a good defense, although the Statute of Limitations is not specially pleaded.

APPEALED from the District Court of the First Judicial District, Hon. R. S. MESICK presiding.

Pitzer & Keyser, for Appellants.

The Court below erred in holding that the right of a miner is merely equivalent to a license to extract the precious metals from the earth. They have a right to the possession of the soil. (*Watts v. White*, 13 Cal. 324; *Merrill v. Judd*, 14 Cal. 64; *Hughes v. Develin*, 23 Cal. 501; *Gore v. McBrayer*, 18 Cal. 582; *Richardson v. McNulty*, 24 Cal. 345.

The Court erred in holding that the same piece of land at the same time may be appropriated by different persons for different uses.

The Court erred in holding that ejectment would not lie for a mining right, or in other words, for a mining claim. (*Table Moun-*

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tain Tunnel Company v. Stranahan, 20 Cal. 209; *St. John v. Kidd*, 26 Cal. 266.)

Proof of possession is sufficient to maintain this action; and slighter circumstances will establish possession in actions for mines than in those for agricultural lands. (See *Atwood v. Frico*, 17 Cal. 43; and *Table Mountain Tunnel Company v. Stranahan*, 20 Cal. 209.)

If a party locates according to the mining laws of his district, and neither abandons nor forfeits by those laws, this is sufficient to recover. (*Gore v. McBrayer*, 18 Cal. 582; *St. John v. Kidd*, 26 Cal. 271.)

Hillyer & Whitman, for Respondents.

The allegations in the complaint were not supported by the proof. The complaint alleges an unqualified ownership or right of possession, the proof at most only shows a right to mine or dig for precious metals in the ground sued for.

The same ground may at the same time be occupied for different purposes by different parties. Respondents cited in the course of their argument on this point the following cases: *Tartar v. Spring Creek Water Company*, 5 Cal. 395; *Burdge v. Underwood*, 6 Cal. 46; *McClintock v. Bryden*, 5 Cal. 97.)

Opinion by BEATTY, J., LEWIS, C. J., concurring specially in the judgment.

This was an action in the nature of an action of ejectment, brought by the plaintiffs in the month of October, 1865, to recover possession of a considerable tract of land in the center of the town of Gold Hill.

The property sued for contains a large number of houses, mills, &c., of great value in that town. The plaintiffs, to sustain their cause, proved that they and their grantors (two of the present plaintiffs being original locators and a third a grantee of one of the original locators) located a mining claim in 1859. That claim as located was 900 by 400 feet, and included the property in controversy. The location was made by putting up a notice of the claim and sticking up a post at each corner of the parallelogram. Subsequently, it was ascertained this location interfered with a mining

location of older date. The boundaries were then so contracted as to leave out the portion interfering with the older location.

The plaintiffs then went to work and prospected the claim, working on it at intervals from September, '59, to December, '60, both inclusive.

The result of this prospecting was to show the ground moderately rich in gold, so rich that it would have been a valuable mining location if water had been obtainable. But in the absence of water, which the country does not afford in its present state, the ground was worthless for mining purposes. The claim, therefore, was not worked, and the parties ceased to occupy or use it in any way, but avowed their intention of holding on to it, to be worked at a future day in the event water was brought by artificial means to the district, and to be had in sufficient quantities for mining purposes. At the time this location was made there were one or two cabins on it occupied by others than the locators. Since its location, there has never been water enough to work the claim except at one time, which was during the winter of 1861, which was a remarkably wet winter. Then, as the water only lasted a short time, it was not available for mining purposes. Since the location of this piece of ground for mining purposes the main street of Gold Hill has been run through it, and it is compactly built up with houses for its whole length.

Whilst this ground was being built up, the plaintiffs occasionally gave notice to those who were improving that they claimed it for mining ground, and expected to occupy it and mine it if ever water was brought in.

Upon the plaintiffs resting, the defendants asked for a nonsuit. The Court granted it, and plaintiffs appeal.

Whilst we cannot fully concur with the Judge who wrote an opinion sustaining the nonsuit in all the views which he expresses, we are perfectly satisfied with the result at which he arrived. We are satisfied the nonsuit should have been granted. The Judge who tried the cause in the Court below seems to think the plaintiffs showed a good and subsisting right to mine the ground in controversy in case water should at any future time be brought into the district. But he holds that the right to mine in the ground and extract the precious metals therefrom gives only a qualified right of possession

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to the miner: that others have a right to occupy ground which has been appropriated for mining purposes, so long as such occupation does not interfere with the free use of the ground for mining operations: that as this ground cannot at present be used for mining purposes, because of the want of water, the occupation of it by others is not an infringement of the rights of the miners, and therefore they have *at present* no right of action.

We cannot see that the miner stands in any different relation to the Government from that occupied by others holding possession of any part of the public domain.

All persons settling on the public domain are mere licensees or tenants at will of the Government, (except in those cases where a party is protected by some pre-emption or homestead law) and we can see no reason why one who appropriates a portion of the public domain for mining purposes is less entitled to the sole and exclusive possession of the ground appropriated than one who appropriates a piece of the same public domain for a garden or a building lot. Indeed, law and custom have given the miner in some respects the advantage over all other appropriators. A mere notice of appropriation or intention to appropriate a certain piece of ground for mining purposes when the proper season arrives, has generally been held to be a sufficient appropriation by a miner, whilst one wishing to appropriate for other purposes can only hold by an actual appropriation and occupation. We are of the opinion the plaintiffs' proof in this case shows they have no right whatever in the premises sued for. Whilst the law facilitates the taking up and holding of mining claims until the proper season of the year arrives for working them, it discourages the holding on to such claims without working them for long and indefinite periods.

The limitation of actions for mining claims is two years. For other actions for the recovery of real estate it is five years. The whole policy of the law is against appropriating the public mineral lands, and holding on to them without work. We do not think a party can go on to the public lands and lay a claim to a portion thereof for mining purposes, prospect the same and then leave it for an indefinite time and still retain his rights therein. Doubtless a miner may take up a claim and hold it until the proper season of the year arrives for working it, without forfeiting his rights—and if

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a season of unusual character (a very dry one, for instance) should intervene, he might wait for a second season. But we do not think a party can, by mere notice, take up a mining claim and hold it for five years without work or occupation, and without any intention to ever work it again, except upon the happening of a very uncertain event, to wit: the bringing of water by artificial means to the district.

If there had been some work for the introduction of water into the district progressing at the time the claim was located, or at the time the locators ceased work thereon, there might have been some reason for suspending work on the mining claim, and awaiting the advent of water. But when no such work was in progress, and no certainty that any such ever would be commenced, it would be altogether unreasonable to withhold the use of the land from other profitable employment because of a mere possibility that the mining locator might, at some future and distant day, be able to use it for mining purposes.

Again, if there were no other objections to plaintiffs' claim, it is clearly barred by the Statute of Limitations. It may be objected that the Statute of Limitations was not pleaded, and is therefore not available to the defendants. The more modern rulings of Courts seem to favor the Statute of Limitations, and allow of its becoming a defense without being specially pleaded. It has been held in some cases that a general demurrer will be sustained to a complaint which shows on its face that a claim sued for is barred by the Statute of Limitations. In this case, whilst plaintiffs' evidence shows they rely exclusively on a mining right claim which is barred by a limitation of two years, the complaint is silent as to the foundation of the right sought to be enforced, so that the defendants could not know, from anything contained in the complaint, that a limitation of less than five years applied to this action. Consequently, it was not the fault of the defendants' pleadings that the Statute was not pleaded.

Under such circumstances the defendants were evidently entitled to either one of two things. They were entitled to all the benefits of the Statute of Limitations, without a special plea of the Statute, or upon the close of the plaintiffs' testimony they were entitled to amend their answer so as to set up that defense. Neither party should be allowed to obtain an unfair advantage by the concealment

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and suppression of facts. The defendants were entitled to every indulgence from the Court in making good their defense, because the plaintiffs attempted to evade the Law of Limitations by concealing the foundation of their claim, and only developing the real nature of the action when they introduced their testimony; and because the claim was a stale one and not founded upon any just or equitable right, but a speculative attempt to deprive innocent parties of their labor and capital invested, without any just compensation.

The judgment of the Court below is affirmed.

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B. F. HASTINGS, RESPONDENT, v. J. NEELY JOHNSON,
APPELLANT.

The State Courts have jurisdiction to hear and determine causes left pending in the late United States Territorial Courts.

When a written promise is made for the payment of a sum certain, payable in gold coin at a day certain, and is followed by a stipulation that in the event it is not paid at maturity the promisee may take judgment for an amount which, in the legal tender notes of the government, is equal in value to the amount of gold coin first mentioned, this is a *debt* for the amount of gold coin first mentioned. The latter clause is a new penalty which cannot be enforced. The judgment must be for the *debt* and interest.

APPEAL from the District Court of the Second Judicial District,
Hon. S. H. WRIGHT presiding.

The facts are stated in the Opinion.

R. M. Clarke and *J. Neely Johnson*, for Appellant, made the following points:

1st. The Court erred in assessing the damage without proof of the value of legal tender notes on the day of trial. The contract, if good for any sum in excess of \$2,500, was only so upon proof of the depreciated value of treasury notes at the time of the trial and date of the judgment.

The answer is in no sense an admission of the fact found.

2d. The Court erred in rendering judgment for "ten per cent. interest" on five thousand dollars. The contract was to pay inter-

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est on \$2,500, at ten per cent. per annum. (See Record, p. 9.)

3d. The legal value of treasury notes at the time of the judgment, was one hundred cents for each dollar, and the Court could not, upon proof or otherwise, affix to them any other value. The measure of damage and the amount for which judgment should have been taken is the sum named in the body of the note, (\$2,500) and interest on that amount at ten per cent. per annum. (*Milliken v. Sloat*, 1 Nevada, 583; *Milliken v. Sloat*, 1 Nevada, 599; *Carpentier v. Atherton*, 25 Cal. 564, 575, and 582; *Feemiter v. Johnson*, 1 J. J. Marshall, 69.)

4th. The judgment in this case was for double the sum warranted by law, both as principal and interest, and must for that reason be reversed. (8 Cal. 396; *Adams v. Dunlap*, 1 Dana, 584; 1 A. K. Marshall, 354; 1 Nevada, 161; 2 Johnson's Cases, 65; 19 Wend. 90.)

Williams & Bixler, for Respondents.

The defendant failed to prosecute his appeal from the order overruling motion for new trial; this Court cannot now notice the first point made by appellant.

As to second point of appellant, if the Court could assess the damages at \$5,000, the statute provides for the interest on that amount.

The third and fourth points made by appellant involve the question, Could the Court enforce this contract according to its terms?

The contract sued on is not strictly a note. (See Byles on Bills, top page 162 to 166, side page 71 to 74; *Cole v. Ross*, 9 B. Monroe, 393; Sedgwick on Measure of Damages, top page 252 to 254, side page 240 to 242.)

The objection made that the complaint is not good, treating this as an ordinary contract and not a note, comes too late. A mere defect in form is cured by verdict. (See following cases: 1 Chitty's Pleadings, 673; *Happe v. Stout*, 2 Cal. 462; *Garcia v. Sarustegui*, 4 Cal. 244; *Minturn v. Burr*, 16 Cal. 107; *Mott v. Smith*, 16 Cal. 554-5; *Galliaro v. Hoberlin*, 18 Cal. 394; *Deputy v. Stapleford*, 19 Cal. 305.)

This was in effect a contract to deliver so much gold (coined) at

a certain time, and if not delivered according to contract, then to pay its value by way of damages.

There could be but two objections to such a contract: one that it was immoral, the other that it violates some positive enactment. Nothing has been shown in the law prohibiting such contracts; it is not suggested that such a contract would be immoral.

On the subject of jurisdiction we assert these propositions:

1st. That the concurrent action of the State and National Governments was necessary to a transfer of the Territorial records to State custody.

2d. That an Act of Congress was not necessary to Federal concurrence in the transfer. That concurrence might be evidenced in any of the ordinary modes adopted by contracting parties, and might even be deduced from a failure to dissent within a reasonable time.

3d. That the State action was complete when the Constitution was adopted. (See Secs. 1 and 4, Art. 17, Schedule.) And the Federal concurrence was complete upon the admission of the State under that Constitution. And the Congress subsequently ratified it in the passage of the Act organizing the United States District Court for the District of Nevada, by making provision for the only cases arising in the late Territory which had not been previously provided for by our State Constitution.

4th. Even admitting that United States *records* cannot be transferred to State custody without Federal consent, still the State has power to determine what shall be the evidence of debts—whether in judgment or otherwise—between her citizens, and for the mode of their collection.

Opinion by BEATTY, J., BROSNAN, J., concurring.

This was an action brought in the Second Judicial District of the *Territory* of Nevada. The pleadings were perfected in that Court, but no trial had. After the organization of the State Government, the case was tried and determined in the Second Judicial District of the *State* of Nevada.

One of the points made on appeal is, that the State Court had no jurisdiction of the action of the parties thereto, and therefore that the judgment was void.

This proposition is maintained on the ground that the Territorial

Courts were Courts created by Congress, and deriving all their authority from that source. That being so created, the State Courts could not exercise any control over the records of the late Territorial Courts without the express sanction of Congress. In support of this proposition, counsel refer the Court to three decisions of the Supreme Court of the United States, to wit: *Hunt v. Palao*, 4 Howard, 588; *Benner v. Porter*, 9 Howard, 235, and *Freebone v. Smith*, 2 Wallace, 173.

The case of *Hunt v. Palao*, was an action of ejectment tried in the Territorial Court of Florida whilst still a Territory. After that Territory was organized and admitted as a State of the Union, a writ of error was asked for to bring up the case for review. The Supreme Court refused the writ, on the ground that the Court which had rendered the judgment had ceased to exist, and no other Court had succeeded to its jurisdiction. For, argues the Court, it would be idle to review this decision and pronounce it erroneous, if there be no Court to which we can direct our mandate for the correction of the error.

And in arguing the points raised, the Court says, in speaking of the record and proceedings of the Territorial Court:

“The proceedings are not in the possession of any Court authorized to exercise judicial power over them, but in the possession of an officer of another Court merely for the purpose of safe-keeping; for the law of Florida does not place these records in the custody of the State Court, but in that of the Clerk; nor does it subject him to the control of the Court in any manner in regard to them.”

Then, so far as the facts of this case were before the Supreme Court, there was no question as to whether the State laws might give the State Court jurisdiction to hear and determine cases that were pending in the Territorial Courts at the time of the change of government; but simply a ruling that the State Courts without legislation had nothing to do with the records or proceedings of the late Territorial Courts.

But the Supreme Court did not stop with deciding the point before them, but went on to use the following language: “And, indeed, if it had placed them in the custody of the Court it would not have removed the difficulty; for the law of the State could not have made them records of that Court, nor authorized any

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proceedings upon them. The Territorial Court of Appeals was a Court of the United States, and the control over its records, therefore, belongs to the General Government, and not to the State authorities; and it rests with Congress to declare to what tribunal these records and proceedings shall be transferred, and how these judgments shall be carried into execution or reviewed upon an appeal or writ of error." This latter quotation is purely a *dictum*, but coming from a Court of great dignity and being not entirely foreign to the subject under discussion, it is entitled to great weight, but not to the authority of a solemn adjudication of a point at issue before the Court.

The case of *Benner v. Porter*, 9 Howard, 235, was an appeal to the Supreme Court of the United States, from a judgment rendered in an Admiralty case by the Territorial Court of Florida, in 1846. The Territory of Florida had been admitted as a State of the Union in 1845. But after the admission of the State, the Territorial Court continued to exercise jurisdiction in Admiralty cases up to the time a United States District Court was fully organized. The Supreme Court simply decided that the Territorial Court could not, under the Constitution of the United States, exercise such jurisdiction. That after Florida became a State, judicial powers could only be exercised therein by State Courts or by United States Courts, presided over by Judges appointed to hold office during good behavior, whilst the Judges of the Territorial Courts were appointed only for four years. So, the question now under discussion was not involved in this case.

But the doctrine in regard to the jurisdiction of State Courts, which we have quoted from 4th Howard, having been referred to in the argument of this cause, the Court took occasion to explain and modify that dictum.

On page 247 of 9th Howard, Mr. Justice Nelson, in delivering the opinion of the Court in this latter case, uses this language: "We have said that the assent of Congress was essential to the authorized transfer of the records of the Territorial Courts, in suits pending at the time of the change of Government, to the custody of State tribunals. It is proper to add, to avoid misconstruction, that we do not mean thereby to imply or express any opinion on the question, whether or not, without such assent, the State judicatures

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would acquire jurisdiction. This is altogether a different question. And besides, the Acts of Congress that have been passed in several instances on the admission of a State, providing for the transfer of the Federal causes to the District Courts, as in the case of the admission of Florida, already referred to, and saying nothing at the time in respect to those belonging to State authority, may very well apply an assent to the transfer of them by the State to the appropriate tribunal. Even the omission on the part of Congress to interfere at all in the matter, may be subject to a like implication. And a subsequent assent would doubtless operate upon past acts of transfer by the State authority."

Now, the Constitution of Nevada provides for the transfer of all pending causes from the Territorial to the State Courts. Congress receives the State into the Union, and admits her representatives who present themselves under said Constitution without objection.

Congress makes no provision for these pending causes, nor any provision for the custody of the records of the late Territorial Courts. Here it appears to us is such a tacit assent to the action of the State authorities as the Court seems to intimate would be sufficient.

The case in 2d Wallace seems to throw no new light on this subject. Besides, it appears to us the State Courts, on every principle of common sense, ought to have jurisdiction in such cases. The State may prescribe what preliminary steps shall be taken to give these Courts jurisdiction as between its own citizens. It may require service to be made by a Sheriff, or allow it to be made by a private individual, or by publication. Why not then provide that the State Courts shall have jurisdiction of all causes of controversy between its own citizens which have been commenced in the Territorial Courts, without further service of summons, and why not say the cause shall proceed to trial on such issues as are made up in the Territorial Courts? So far as the power is concerned, we see no objection. It is true, the records of the late Territorial Court belong to the General Government. Congress has the *power* to do what it pleases with them. It might order them to be removed to Washington City. This might create trouble and inconvenience. But we do not think it affects the question of power. The State may, as long as the records of the Territorial Courts are within her

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territory and control, use those records as the foundation of civil proceedings to determine the rights of the citizens in its own Courts. If Congress should remove these records, or restrain their use by the State Courts, some law to substitute copies, or some other remedial statute, would have to be passed by the State.

We conclude, then, on this point, that the State Courts have jurisdiction to hear and determine causes left pending in the late Territorial Courts. And the District Court did not err in hearing and determining this cause.

The obligation on which this suit was brought is in the following form:

CARSON CITY, N. T., March 30th, 1864.

[\$2,500.] On the first day of July, A.D. one thousand eight hundred and sixty-four, (1864) I promise to pay E. M. Van Kleeck or order twenty-five hundred dollars, in current gold coin of the United States of America, with interest thereon from date at the rate of ten per cent. per annum; and if said sum and interest is not paid when due, in coin as aforesaid, then the said Van Kleeck is authorized to sue for the same, and shall have and recover judgment in a sum which, in the legal tender notes of the United States of America, shall in amount equal the value in the market of the above town at the date of said judgment the whole of said sum of gold coin in legal tender notes.

J. NEELY JOHNSON.

The complaint alleges substantially, that when suit is brought, one dollar in legal tender notes is only worth forty cents in gold, and prays for a judgment on that basis. The answer alleges they are worth fifty cents in gold. The judgment was rendered for just twice the face of the notes, or at the rate of fifty cents on the dollar for legal tenders.

There is no statement, and the record, we think, perhaps, fails to show some of the alleged errors. But the record does present the only real question (other than the one of jurisdiction) of importance in the case. That question is, should the judgment on the facts presented by the complaint and answer have been for \$2,500, or for what \$2,500 in gold would, at the time of breach of contract, been worth in legal tender notes?

This, we confess, is a question somewhat embarrassing. We are not called on here, as under the State Specific Contract Act, to enter a judgment declaring the same shall not be paid in that which the law of the Government says shall be a legal tender for all private debts (which of course includes money judgments); but the simple question is, what shall be the *amount* of the judgment upon such a contract as that sued on? The apparent equity of the case and the intention of the parties would alike seem to require that the judgment of the Court should be for the value of \$2,500 in gold, when reduced to the standard of legal tender notes. But we think there are certain inflexible rules of law which will not admit of such a judgment.

The instrument sued on certainly creates a debt. It is a debt of \$2,500. That it is by its terms payable in gold does not make it less a debt. The instrument is at the beginning in form of a promissory note for \$2,500, and interest from date at ten per cent. per annum. This note is followed by a sort of penal clause, attaching a penalty or prescribing what judgment shall be rendered if it is not paid at maturity. Under the rulings of this Court in several cases, there can be no question but that defendant, on the day it fell due, might have discharged the note by the payment of \$2,500, and ten per cent. interest thereon, in legal tender notes. He could have so discharged it because the note is a *debt* in its most technical sense, and the law has said legal tender notes shall be a tender for all *debts*.

Now, if the defendant could have paid the note off in legal tenders the day it fell due, it appears to us he is still entitled to do the same by tendering, in addition to the debt, the accumulated interest and costs, and that it was an error to render judgment for a larger amount.

This is somewhat similar to an ordinary penal bond. If an obligor in a bond binds himself to pay \$1,000 at a day certain, but attaches to that bond a recital that it is given to secure the payment of \$500, and interest at ten per cent. per annum from date, that if the \$500 and interest is paid at a certain day the bond is to become void, but if not paid the entire bond is to be payable, no Court would enforce the payment of more than \$500 and interest. This appears to us a very similar case, only the real sum to be paid is mentioned first

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and the consequences of nonpayment at the day of maturity follows, instead of preceding that sum, as in ordinary penal bonds.

There is also another objection to enforcing such a contract according to its letter. It appears to us to be contrary to the policy of the law to enforce a penalty against a party for doing what the law says he may do—for paying his debts with that currency which the law says shall be a legal tender for all debts.

We hold, then, that the judgment in this case should have been for \$2,500 and interest thereon at the rate of ten per cent. per annum from the date of the note, and it was error to render judgment for any greater amount.

It is stated by counsel for respondent that certain liens have attached, and certain rights have grown up under this judgment which would be injuriously affected by a reversal, but might be preserved under a modification of this judgment, so made as to give the appellant all the relief to which he is entitled, but not to destroy the lien of the judgment.

As such course seems to be equitable and just under the circumstances of this case, we will make such order as will at once give the appellant the relief to which he is entitled, and preserve the lien of the respondents.

It is therefore ordered that if the respondent, within ten days after the filing of this opinion, shall file with the Clerk of the District Court of the Second Judicial District of the State of Nevada a release from all of said judgment, except the costs in the Court below and the sum of twenty-five hundred dollars principal, and interest thereon from the thirtieth day of March, A.D. 1863, at the rate of ten per cent. per annum, and will enter the costs of this appeal as a credit on the remainder of said judgment, the judgment of the Court below, so modified, will be affirmed; otherwise this Court will, after the expiration of ten days, make an order reversing the judgment of the Court below.

If any money has been collected on this judgment, or any sales made hereunder for an amount in excess of what remains due on this judgment, after the same has been reduced in accordance with the views herein expressed, the Court below will make all necessary orders to protect the rights of appellant.

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It is further ordered that a remittitur may forthwith issue in this case.

Opinion by BEATTY, J., BROSNAN, J., concurring.

This case only differs from the one between the same parties in this, that the original debt was for \$1,500 instead of \$2,500, and the judgment was rendered in the Territorial District Court before the State Constitution was formed.

It is to be governed by the same principles as case No. 514. It is therefore ordered that if the appellant, within ten days after the filing of this opinion, shall file with the Clerk of the District Court of the Second Judicial District of the State of Nevada a release from all of said judgment which is in excess of fifteen hundred dollars and interest thereon at the rate of ten per cent. per annum from the thirtieth day of March, 1863, and the costs adjudged to plaintiff in the Court below, and will enter the costs of this appeal as a credit on the judgment thus reduced, and also will credit on the judgment thus reduced whatever may have been made by any execution heretofore issued in this case, (unless the same has already been credited) then the judgment in the Court below, so modified, will be affirmed.

It is further ordered that a remittitur may issue immediately on the filing of this opinion, and the filing of the release herein specified.

9	199
14	35
14	36
14	157

LOUIS McLANE, JR., APPELLANT, *v.* ABRAMS ET AL.,
RESPONDENTS.

When a party borrows money and agrees to pay a certain rate of interest until due, the contract is broken when the day of payment is passed, and the note remains unpaid. After breach, in the absence of a continuing contract as to interest, the Statute fixes the damages to be recovered.

By our Statute, the rate of interest (or damage for detention) after breach is the same as that fixed by the contract before breach.

The Statute gives damages at the rate of ten per cent. per annum for the withholding of money generally. But for withholding of money which bears a higher rate of interest by contract, a corresponding damage for withholding is allowed.

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And that higher interest is allowed although the contract itself does not provide for such higher rate after maturity of the debt.

A Court of Chancery may allow the mortgagee a per centage for the expense of collecting his mortgage when the instrument provides for such allowance.

If the mortgagee is compelled to file a cross bill, in a case where he is made defendant, to collect his mortgage debt, he will be entitled to the same per centage as if he had filed an original bill.

The allowance for a foreclosure suit should not always be the full amount mentioned in the mortgage, but a reasonable amount not exceeding that provided for. In this case there is nothing to show the allowance of ten per cent. was unreasonable.

PER BRATTY, J.—A Court of Equity may take judicial notice of what is a reasonable fee for foreclosing a mortgage in such Court. Ten per cent. on the amount of the mortgage was, in this case, unreasonable, and the Court should have reduced the allowance.

APPEAL from a decree of the District Court of the First Judicial District, Storey County, Hon. R. S. MESICK presiding.

On the twelfth of August, 1863, the owners of certain property in Virginia City, executed to M. Abrams a mortgage to secure the payment of \$6,000 and interest. \$3,000 were loaned, and note taken at the time the mortgage was executed, and M. Abrams agreed to advance the other three thousand as soon as certain improvements were made on the mortgaged property. In due time the other three thousand were advanced, and a second note executed. In October, 1863, the owners of the property executed a second mortgage thereon. The present plaintiff is the assignee of that mortgage. Some days subsequent to the execution of the second mortgage M. Abrams assigned a half interest in his mortgage to S. Abrams. At a still subsequent date the mortgagors placed the property in the hands of the Abrams, or their agent, to collect the rents, keep down the interest on both mortgages, and pay the surplus of the rents to other purposes, as directed by the mortgagors. The property so remained in the hands of the Abrams, or their agent, up to the trial of this case. The suit was brought by the assignee of the second mortgage, making the Abrams defendants. They set up their prior mortgage, and asserted that the whole \$6,000, principal, and a portion of interest on their mortgage, was due and unpaid. The plaintiff claimed that the money retained by the Abrams out of the rents not only paid all the interest on their notes and mortgage, but a large portion of the principal.

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The note and mortgage given to Abrams called for interest at three and one-half per cent. per month, and at that rate they had retained it out of the rents. The plaintiff claimed that after the notes to Abrams became due, they only had a right to exact interest at the rate of ten per cent. per annum; that the amount they retained over and above ten per cent. per annum, for interest after the notes were due, should be applied as a credit on the principal. There was also a further controversy as to what allowance, if any, should be made to the Abrams for their counsel fees, etc., expended in enforcing their mortgage and collecting the \$6,000 due to them.

The following is a copy of the first note given to M. Abrams; the other is of similar import.

“VIRGINIA CITY, Aug. 12th, 1863.

“One year from date, for value received, we jointly and severally promise to pay to M. Abrams, or order, the sum of three thousand dollars, also interest thereon at the rate of three and one-half per cent. per month, said interest to be paid monthly, at the end of each month, calculating from this date; and if said interest is not so paid, then the whole sum, principal and interest, shall become at once due, payable, and collectable; and in case said principal and interest, or either, are not paid when due, and the holder hereof shall have occasion to bring suit for collection of the moneys due hereon, and shall bring such suit, then we promise to pay the further sum of ten per cent. upon the whole sum due or unpaid, for attorneys’ fees and commissions upon said collection. This note is given for a loan made to us of three thousand dollars in the gold coin of the United States, and all payments to be made in the gold and silver coin of the United States, and not otherwise.

“GUSTAVE BAYREUTHER,

“ALBERT BAYREUTHER.

“In presence of

“JAS. F. HUBBARD.”

The Court below held that the Abrams were entitled to interest at three and one-half per cent. per month until paid, and ten per cent. upon the amount due for counsel fees, etc.

The plaintiff (assignee of the second mortgage) appeals.

Williams & Bixler, for Appellant.

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The Abrams notes bore interest at the rate of three and one-half per cent. per month up to maturity; after that they bore only legal interest—ten per cent. per annum. (*Brewster v. Wakefield*, 22 How. U. S. 118; *Ludwick v. Huntsinger*, 5 Watts & Serg. 59–60; *Henry v. Thompson*, 1st Minor, Alab. 209; *United States v. Chapin*, 9 Wend. 471.)

Kohler v. Smith, (2 Cal. 597) has been overruled by the subsequent case in 22 Howard, United States.

No consent or new contract of the mortgagors could continue the rate of interest on the prior mortgage to the prejudice of the second mortgagees. (*Lord v. Morris*, 18 Cal. 490; *McCarthy v. White*, 21 Cal. 495; *Grattan v. Wiggins*, 23 Cal. 16; *Coster v. Brown*, 23 Cal. 143; *Gamble v. Voll*, 15 Cal. 507–510.)

Even if the mortgagors had the power to make a contract with Abrams for the continuance of their interest at three and one-half per cent., they never did in fact make it. The contract was to allow them to collect the rents and pay *their* interest. That is, to pay what they were legally entitled to. If any such contract was attempted to be made, it was without consideration and void. There was no agreement for forbearance. Mere forbearance, when the creditor is not bound by any contract to forbear, is not a sufficient consideration to support a promise. (Chitty on Contracts, 37.)

The Abrams were not entitled to counsel fees under the terms of their contract. They were to have such fees allowed them “if they have occasion to bring suit * * * and shall bring suit.” Now the suit is not brought by them, but by the junior mortgagee.

Quint & Hardy, for Respondents.

The Statute of this State is very different from that of the Territory of Minnesota, on which the decision in 22 Howard turned. The interest having been paid by the mortgagors cannot be recovered in this action.

Our Statute is a copy of the California Statute. That had received a judicial construction by the highest Court of that State, before the adoption thereof by this State. In copying it we adopted the California construction.

On the point of recovering back interest once paid, respondents cited the following authorities. (*Spencer v. Ayrault*, 10 N. Y. [6

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Sel.] 202; *N. Y. Life Ins. & Trust Co. v. Manning et al.*, Sand. Ch. R. 3d, 58; *Kellogg v. Hickok*, 1 Wend. 521; *Mowry v. Bishop et als.* 5 Paige, 98; *Reab v. McAlister*, 8 Wend. 109; 4 Wend. 483; 3 Comstock, 502; 7 Barbour, 235; *Miller v. Burroughs*, 4 Johns. Ch. 436; *Van Buren v. Grossbeck*, 4 Cow. 496.)

Opinion by LEWIS, C. J., BROSNAN, J., concurring.

The principal questions involved in this appeal are : first, does a promissory note, providing for the payment of three and a half per cent. per month interest, but which does not, in express terms, continue that rate of interest after the maturity of the note, bear the stipulated rate after maturity, or only the legal rate ; and, second, are the defendants entitled to counsel fees and commissions under the stipulations of the note. The note or instrument upon which these questions arise reads as follows :

“VIRGINIA CITY, August 12, 1863.—One year from date, for value received, we jointly and severally promise to pay to M. Abrams, or order, the sum of three thousand dollars ; also interest thereon at the rate of three and one-half per cent. per month, said interest to be paid monthly at the end of each month, calculating from this date ; and if said interest is not so paid, then the whole sum, principal and interest, shall become at once due, payable, and collectable ; and in case said principal and interest, or either, are not paid when due, and the holder hereof shall have occasion to bring suit for collection of the moneys due hereon, and shall bring such suit, then we promise to pay the further sum of ten per cent. upon the whole sum due and unpaid for attorneys’ fees and commissions upon said collection. This note is given for a loan made to us of three thousand dollars in the gold coin of the United States, and all payments to be made in the gold and silver coin of the United States, and not otherwise.”

It is urged, on behalf of the appellant, that upon this note interest at the legal rate only can be recovered after maturity, and the following authorities are relied on in support of this position : *Brewster v. Wakefield*, 22 How. 118 ; *Ludwick v. Huntsinger*, 5 Watts and Serg. 59 ; *Henry v. Thompson*, 1 Minor, 209.

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To the correctness of these decisions, under the statutes upon which they were made, we give our ready assent. It is a familiar rule of the law of damages (in the absence of express statute providing a different rule) that upon the breach of a contract for the payment of money the measure of damages shall be the legal interest on the sum due to the plaintiff from the time of the breach ; and notwithstanding parties may have agreed upon a different rate of interest in the investment, it would not by any means be presumed that such interest was to continue after the maturity of the instrument, unless the parties to it expressly contracted that it should, because it could never be presumed that the promise to pay interest extended beyond the time when the principal was agreed to be paid. After the maturity of a promissory note, the express promise or undertaking of the maker ceases, and the instrument itself, as it were, becomes *functus officio*. As in the absence of express provisions it could not be presumed that the promise of a party extends beyond the time limited in the written contract for payment, the statutes existing in all the States give the party a remedy which otherwise he probably would not have by allowing him to recover legal interest on his debt from the time of its maturity until it is collected, as damages for the breach of contract. But it will not be denied that, when not prohibited by usury laws, an agreement between parties, fixing a higher rate of interest or damage after maturing, would be enforced. So too, it must be admitted that it is perfectly competent for the legislature of any State to provide by law that the same rate of interest agreed upon by the parties to be paid before the debt becomes due, shall be allowed after its maturity, instead of the legal rate. As it is admitted that the makers of the note and mortgage in this case have not expressly promised to pay any rate of interest at all after the maturity of the debt, it becomes necessary to determine whether the statute of this State does in fact make the interest agreed upon in writing by the parties to be paid, without expressly mentioning that it shall be paid after maturity, the measure of damage to be allowed after the maturity of debt, or whether, to authorize a recovery of more than the legal rate of interest after a debt becomes due, it is necessary that there be an express promise to pay more than the legal rate *after maturity, or until the debt is paid.*

The result of our examination of the statute is, that all instruments whereby interest is agreed to be paid shall bear the same rate after maturity and until the debt is paid as they do before. It is provided by section four, page 100 of the Laws of 1861, that "*when there is no express contract in writing fixing a different rate of interest, interest shall be allowed at the rate of ten per cent. per annum for all moneys after they become due on any bond, bill, or premium note,*" etc. And section five declares that "parties may agree in writing for the payment of any rate of interest whatever on money due, or *to become due* on any contract. Any judgment rendered on such contract shall conform thereto, and shall bear the interest agreed upon by the parties, and which shall be specified in the judgment." Giving to the language of this fourth section a liberal, and its most natural construction, the purpose sought to be accomplished by the framers seems to have been simply to establish an uniform rate of interest in all those cases where there is no express contract in writing fixing a different rate. It is only where there is no contract in writing fixing a different rate that interest at ten per cent. per annum is provided for. By necessary implication, where there is a contract in writing fixing any rate of interest, that rate shall prevail in all cases. But the learned counsel for appellant claims a more restricted and, what seems to us, an unwarrantable construction of the sections above referred to, which is, that the words, "*when there is no express contract fixing a different rate of interest,*" must be taken to mean a contract whereby a different rate of interest is expressly agreed to be paid *after maturity*, as for instance, *until the principal is paid*. It is true, the language of the fourth section might bear this interpretation; not, however, without restricting the words employed more than we can see any reason for. The language employed is sufficiently general to include all contracts wherein the parties have fixed a rate of interest, though there be no express agreement that that rate shall continue after the maturity of the principal. Why, then, hold that the Act refers only to those contracts wherein the parties have expressly provided that the interest fixed by them shall continue after the maturity of the debt, or until it is paid? The provisions of the fifth section cannot be made to harmonize with such construction. It declares that the "parties may agree in writing for the payment of any rate

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of interest whatever on money due or to become due," and the judgment rendered on such contract shall conform thereto, and shall bear the interest agreed upon by the parties. These general words are certainly sufficiently comprehensive to include all contracts wherein the interest to be paid is fixed in the instrument, though not expressly to be continued after its maturity.

The judgments here referred to are those rendered upon contracts, wherein the parties have agreed for the payment of some specified rate of interest; not where they have agreed upon its payment after the maturity of the debt. There is nothing in the language of the Act to justify its restriction to any peculiar class of contracts. But on the contrary it seems expressly to comprehend not only those contracts where interest is agreed to be paid before the debt becomes due, but also where it is fixed after its maturity. Where the interest is agreed upon in writing for money due or to *become due*, the judgment shall conform to the contract, and 'shall bear the same rate of interest. The agreement to pay a certain rate of interest on money to *become due* is certainly not an agreement to pay it after it becomes due, and yet it is clear the judgment on such an agreement would bear the rate of interest agreed on by the parties. If the judgment on such contract is to bear the rate of interest agreed on by the parties, it will hardly be claimed that after maturity and before judgment, the debt shall draw a different rate of interest. The provision that the judgment shall bear the rate of interest agreed on by the parties in the contract is clear evidence that it was the intention that such interest should continue from the time fixed in the contract until the debt is paid. There is another and very cogent reason why this construction should be adopted. It is a rule of construction too familiar to require the citation of authorities, that where one State adopts the statute of another, it is adopted with the construction placed upon it by the highest Court of judicature of the State from which it is taken. The reason upon which this rule rests, gives it an importance and weight which should not be disregarded except upon the most urgent reasons. When the Legislature of one State adopts the laws of another, it is presumed to know the construction placed upon those laws in the State from which they are adopted, and therefore that it adopts that construction with the law—that it

incorporates into the law the construction which is placed upon it at the time it is adopted. Hence, for the Courts of the State adopting such laws to disregard such construction would be almost as unjustifiable as to disregard the clearly expressed will of the Legislature itself. Before the Legislature of the Territory of Nevada adopted the Act under consideration, it had received the construction which we have placed upon it from the Supreme Court of the State from which it was taken. (*Kohler v. Smith*, 2 Cal. 597.)

We therefore consider ourselves bound by that decision, in the absence of clear and convincing reasons that its authority should not be respected. But much weight is given to the fact that the case of *Brewster v. Wakefield*, 22 How. 118, was a later case than *Kohler v. Smith*, and that the latter case was virtually overruled thereby. True, the case of *Brewster v. Wakefield* is the later case, but we cannot see that it in the least impairs the authority of *Kohler v. Smith*, for though the first and second sections of the Minnesota statute in effect correspond with the fourth section of our Act, yet there seems to have been nothing in the Minnesota statute which corresponds with the fifth section of our Act, which section we think clearly favors the construction adopted by the Supreme Court of California. The case of *Brewster v. Wakefield* is therefore not entitled to the same weight in this Court as that of *Kohler v. Smith*; and in view of the fact that in the latter case the Supreme Court of California gave a construction to a statute subsequently adopted verbatim by this State, we deem it incumbent upon us to give it the same construction, and to hold that the defendants are entitled to the interest agreed on in the note and mortgage until the debt is discharged. And to a qualified extent we think the Court below held correctly on the second point. There is no doubt but that it is perfectly competent for parties to stipulate in a mortgage that a certain sum, or a certain per centage shall be allowed the mortgagee for attorneys' fees or expenses, if he be compelled to bring suit to recover his debt. (*Cox v. Smith*, January term, 1865.) By contract in this case, it is agreed that "in case said principal and interest, or either, are not paid when due, and the holder hereof shall have occasion to bring such suit, then we promise to pay the further sum of ten per cent. upon the

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whole sum due and unpaid for attorneys' fees and commissions upon said collection." It is claimed by appellant that the defendants have not been compelled to bring suit; that filing a cross bill, as they have done in this case, is not bringing a suit. It cannot be denied that they have not brought suit in the strict sense of the words, but a reasonable construction must be given to the language employed by the parties, and effect given to their real intention, if it can be done without violence to the language employed by them. Now the intention of these parties is obvious. It was to provide for reimbursing the mortgagee for any expense which he is necessarily put to in collecting his debt. In this case they are compelled to come into Court to protect themselves; they file a cross bill which places them in the same position as if they had filed their bill for foreclosure.

So they are compelled to incur the expense which the parties seem to have provided for by the allowance of ten per cent. upon the amount due and unpaid. But in all cases where attorneys' fees are provided for in instruments of this character, only a reasonable sum should be allowed. The entire sum stipulated should not be allowed to parties where it would be an exorbitant or unreasonable fee. So this Court decided in the case of *Cox v. Smith*, above referred to.

There is nothing in the record in this case which would authorize us to say that ten per cent. is an unreasonable compensation for counsel. The judgment must therefore be affirmed.

By BEATTY, J.

I concur in the foregoing opinion, with this exception. I think a Court of Chancery may judicially notice what is a reasonable fee for conducting business before such Court, and when an extravagant allowance is made by the terms of a mortgage for the foreclosure of the same, that such Court should treat the allowance named merely as a penalty, and make such reasonable allowance only as a prudent man would pay for a foreclosure if the money had to come out of his own pocket and not that of the mortgagor. In this case I think ten per cent. was an extravagant allowance. I think the Court below should have only allowed judgment to go for a reasonable amount not exceeding ten per cent. The Judge pre-

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siding might have fixed it either upon his own sense of what was right, or he might have inquired of counsel in his Court, either under oath or not, according to his discretion.

CHARLES L. LOW, RESPONDENT, *v.* ALPHEUS STAPLES
ET AL., APPELLANTS.

Courts of Equity independent of the statute might, in a proper case, remove a cloud from title.

Courts of Equity will always interfere to protect one from the operation of a deed which is void, or from some cause ought not to be enforced, unless the deed is void on its face, when there is no necessity for such interference.

Before a Court of Equity will interfere to remove a cloud, they must be satisfied that the party seeking relief has the legal title. If the possession is held adversely, the Court may properly refuse to act until the complainant has established his legal title by an action at law.

Where the possession of the realty is in a corporation holding for the benefit of the original owners and assignees, and willing to recognize the right of whoever holds the proper assignment or transfer of the property, it is not necessary to bring an action at law preliminary to the establishment of a lost deed, and the removal of a cloud.

The statute (Practice Act, Secs. 254-5) does not restrict any preëxisting right or remedy, but seems to give in some cases a new and more extensive remedy.

The fact that defendants appeared and filed their answer in the District Court of the State, removes all question or doubt which might otherwise have arisen as to whether the record in this case was lawfully removed from the Territorial to the State Court.

APPEAL from a decree of the District Court of the First Judicial District, Storey County, Hon. RICHARD RISING presiding.

This was a bill filed by C. L. Low against Alpheus Staples and others, in which the plaintiff alleges that Joseph Brown, one of the defendants, was one of the original locators of a mining claim now known as the Crown Point claim; that Brown sold his interest to one Brobant by bill of sale, Brobant to one Robinson, and Robinson to Lindauer and Fleishhacker, from whom plaintiff holds by several mesne conveyances; that Brown's bill of sale to Brobant, and Brobant's to Robinson, have both been lost; that on each transfer or sale of this interest of Brown, the possession accompa-

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nied the transfer; that, recently, Brown had made a fraudulent transfer of his original interest of one-tenth in the location, to Staples; that Staples took with a full knowledge of the former sale from Brown to Brobant. There are many other allegations made in the complaint, but these are all that are necessary to understand the points decided in the case. The plaintiff sustained all the material facts alleged in his complaint, except as to possession. Upon this point the proof was, that the mine was being worked by an incorporated company, who acknowledged an interest of one-tenth thereof as being in whoever represented the Brown interest. In regard to that interest, the company did not pretend to determine anything, but left the parties to litigate their rights in Court; ready to acknowledge the rights of either when established in the proper tribunals.

B. C. Whitman, Aldrich and De Long, for Appellants.

This action is governed by the statute. (Practice Act of 1861, Sec. 254.) Actual possession, as contradistinguished from constructive possession, is necessary to maintain this proceeding.

The Court finds that the actual possession is in the Crown Point Company; that the plaintiff only has a constructive possession, arising from the fact of tenancy in common existing between plaintiff and the company; that this is not a sufficient possession.

(See Adams' Equity, p. 463; 2 Story's Equity Jurispru. p. 49; *Eldridge v. Hill & Murray*, 2 John. Ch. 281; *Ritchie v. Dorland et al.*, 6 Cal. 33; *Curtis v. Sutter*, 15 Cal. 260; *Rico et al. v. Spence et al.*, 21 Cal. 504; *Head v. Fardyce*, 17 Cal. 149.)

This bill cannot be maintained outside of the statute. It is claimed that the Court can take cognizance of the case, because of the allegations of fraud. But if the allegation of possession on the part of plaintiff was stricken out, the bill would not present a case in which a Court of Equity could interpose.

The appellants also raised the point on oral argument, that this case having been commenced in the Territorial District Court, the State could never acquire jurisdiction of the parties.

Williams & Bizler, for Respondent.

When the loss of a deed creates a defect in the arraignment of

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title, the Court will compel a reëxecution. (*Cummings v. Coe*, 10 Cal. 529.)

A Court of Equity will always cancel a deed which casts a cloud on title. (*Pixley v. Huggins*, 15 Cal. 127.)

This proceeding was not based on Sec. 254 of the Practice Act, but on established equity principles independent of that statute. The fact that plaintiff was not in possession, could not deprive him of this equitable relief. (*Dana v. Cignego*, Cal. October Term, 1863; *Hagar v. Shindler*, Cal. July Term, 1865; *Ferris v. Irwin*, Cal. July Term, 1865; *Smith v. Orton*, 21 Howard, U. S. 243; 2 Story's Equity, Sec. 700.)

Even if possession were necessary to maintain this action, plaintiff, under the circumstances of this case, had the possession. The possession of one tenant in common, is the possession of all his cotenants. (*Waring v. Crow*, 11 Cal. 371; *Owen v. Martin*, 24 Cal. 376-7.)

Opinion by LEWIS, C. J., full Bench concurring.

The appellants in this cause make two points upon which it is claimed the judgment in the Court below should be reversed.

First—That the plaintiff upon the trial failed to show, and the Court to find, that the plaintiff was in possession of the premises at the time the action was instituted; and, second: that as the suit was commenced in one of the District Courts of the Territory of Nevada, the State Court obtained no jurisdiction of it, and that the decree is therefore void. Were this, as claimed by counsel, a suit brought under Section 254 of the Civil Practice Act, which provides for the determination of conflicting claims to real property, undoubtedly the possession of the plaintiff would be indispensable to entitle him to the relief which he seeks. But, in our opinion, it is not necessarily governed by the statutes referred to. The plaintiff seeks a remedy which Courts of Equity have always granted independent of any statute, where a proper case was made out. The relief sought is a decree to compel certain persons to execute deeds of conveyance to the plaintiff, and to remove a cloud from his title. That it requires no statutory provisions to enable a Court of Equity to award relief in such cases, there can be no doubt.

In speaking of the power of the Courts to order the surrender or

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cancellation of instruments which it would be unjust to enforce, or which cast a cloud upon a title, Mr. Story says: "The party is relieved upon the principle, as it is technically called, *quia timet*: that is, for fear that such agreements, securities, deeds, or other instruments, may be vexatiously or injuriously used against him when the evidence to impeach them may be lost, or that they may now throw a cloud or suspicion over his title or interest; *a fortiori* the party will have a right to come into equity to have such agreements, securities, deeds, or other instruments delivered up and canceled, where he has a defense against them which is good in equity, and not capable of being made available at law." Story's Equity Jurisprudence, Section 694. Indeed, in all cases where an instrument is void, or should not in justice be enforced, or has a tendency to cast a cloud upon the title of another, and the illegality of the deed or instrument is not apparent upon its face, the Courts have never hesitated to decree a surrender or cancellation of such instrument. (Id. 700; *Reed v. Bank of Newburgh*, 1 Paige R. 215; *Petit v. Shepherd*, 5 Paige R. 493; *Van Doren v. Mayor of New York*, 9 Paige, 388.) Should the instrument carry the illegality upon its face, so that its nullity can admit of no doubt, the reason for the interposition of equity to decree its surrender or cancellation does not then exist, for such instrument could cast no cloud upon the title, and there can be no danger that lapse of time will deprive a party of his full defense. It is in such cases only that relief is refused; nor did the plaintiff's right of relief, where he sought to remove a cloud from his title, necessarily depend upon his possession of the premises. It is true, when a party applies for any equitable relief in aid of his legal title to real estate, that Courts of Equity must be satisfied the complainant has a legal title before granting relief. And if the possession should be held adversely, the Court might well say to complainant: "Establish your right by action at law, or else this Court cannot be satisfied that you have a legal title." But in a case like this, we see no necessity for an action at law. The possession is in an incorporated company, which admits the rights of whoever holds the Robinson title. The plaintiff shows he has a title properly derived from Robinson; but that the claim of title has been broken by the loss of some of the deeds. He wishes by this proceeding to establish that claim of title, to have the lost

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deeds supplied, and a cloud removed. We see in such case no necessity for an action at law to give possession. If he establishes his chain of title, his rights will be acknowledged—no action at law will be required. Independent of any statute, therefore, the plaintiff's remedy was complete in equity; and, notwithstanding Sections 254 and 255 may be sufficiently comprehensive to embrace the remedy now sought by the plaintiff, it will hardly be claimed, we apprehend, that this Statute entirely supersedes the remedy which existed independent of it. The Statute gives a remedy in cases where perhaps without it none existed. For instance, if the plaintiff be in possession, he has a remedy against all persons claiming adversely, whether such claim casts a cloud upon his title or not; thus far the old equity jurisprudence of the Court is extended, but further than this we do not think it affected. We are, therefore, of opinion that the bill may be maintained regardless of whether the plaintiff is in possession of the premises or not. As to the second point, *i.e.*, whether the District Court, before which the cause was tried, had jurisdiction or not, it may be observed that although the cause was commenced in the Territorial Courts, the subsequent appearance in the District Court of the State leaves no doubt that it obtained jurisdiction of the parties. The record in this cause, together with all others, was transferred from the District Court of the Territory to that of the State, whether by proper authority or not, is of no consequence; for the defendants by appearing, filing their answers, and trying the cause, will be deemed to have consented to such transfer; and then, voluntary appearance in the State Court was equivalent to the issuance of a summons from that Court, and the service of same upon them. Had the action been finally disposed of in the Territorial Courts, the jurisdiction of the State Courts over the decree or judgment might be questionable. But as that question does not arise here, we do not wish to be understood as expressing an opinion upon it.

The decree of the Court below must therefore be affirmed, and it is so ordered.

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GILLIG, MOTT & CO., RESPONDENTS, v. THE LAKE BIG-
LER ROAD COMPANY, APPELLANTS.

This Court has never held it indispensable that a statement should be made in the Court below of the grounds relied on upon appeal, in order to entitle the appellant to a hearing. Whilst the Court has censured the loose practice of omitting such statement of these grounds of error, it has not denied relief to litigants for the carelessness of their counsel in this respect.

The exceptions to the rulings of the Court below will be treated as a substitute for a statement of the grounds of error relied on.

When there is anything on the face of a note or bill of exchange showing that the party signing is acting for another, and not himself, parol testimony may be introduced to bind the principal.

A bill and acceptance in the following words indicates that J. E. Garrett was acting as agent for the Lake Bigler Road Company, and not for himself, in the acceptance :

LAKE BIGLER ROAD COMPANY, }
Carson, January 15th, 1864. }

[\$2,000.] Four months after date, pay to the order of Messrs. Gillig, Mott & Co. two thousand dollars, with interest at two and one-half per cent. per month till paid—value received—and charge the same to the account of

BUTLER IVES, Sup't.

To J. E. GARRETT, Secretary, Carson.

The mere writing the word "agent" after the signature to a note or bill will not bind the principal; but if the name of the principal appears on the face of the instrument, then the word "agent" following the signature may, in connection with other things in the instrument, indicate that the principal only is bound.

The word "Superintendent," or "Secretary," written after a signature, has the same effect as the word "agent."

Although the written authority to the Secretary did not authorize him to accept bills, yet the fact that he had frequently accepted bills in favor of plaintiff, which were paid by defendant without complaint, was sufficient to bind defendants on other acceptances.

When a company is sued, under the provisions of our Practice Act, by its firm name, and subsequently on trial it is proved who compose that company, judgment may go not only against the company property, but against individuals composing that company.

APPEAL from the District Court of the First Judicial District, Storey County, the Hon. RICHARD RISING presiding.

All the facts necessary to an understanding of the points decided are stated in the Opinion.

Atwater & Flandrau, Clayton & Clark, for Appellants.

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The Court erred in permitting the bills to be introduced in evidence. They do not, on their face, purport to be the bills of defendants, and parol evidence is not admissible to prove them such. (Parsons on Notes and Bills, Vol. 1, pp. 92, 93, and 94; Story on Agency, sec. 147, pp. 162-3; 2 Kent's Com. pp. 804-5; Chitty on Bills, pp. 36-40; *Stackpole v. Arnold*, 11 Mass. 27; *Barker v. Mechanics' Fire Insurance Co.*, 3 Wend. 94; *Moss v. Livingston*, 4 Coms. 208; *Hills v. Bannister*, 8 Cow. 31; *Eaton v. Bell*, 5 Barn. & Ald. 13; *Taber v. Cannon et al.*, 8 Metc. 456; *Bayliss v. Pierson*, 15 Iowa, 279; *Pentz v. Stanton*, 10 Wend. 271; *Fenly v. Stewart et als.*, 5 Sand. S. C. R. 101.)

The words annexed to the signatures, "Superintendent" and "Secretary," do not denote agency. (1st American Lead. Cases, p. 604.)

Neither Garrett nor Ives had authority to bind the company by drafts on bills of this kind. Their authority was strictly limited. The power under which they acted should be strictly construed. (*Beach v. Vandewater*, 1 Sand. S. C. R. 265; *Nixon v. Palmer*, 4 Sel. 398; *North River Bank v. Aymar*, 3 Hill, 262.)

The Court erred in permitting the jury to find who were members of the Lake Bigler Road Company. The suit was against the company as such, and not against the individual members. (See Stat. of 1861, p. 414, sec. 581.) This is not affected by the Act of 1862, p. 120.

Quint & Hardy, for Respondents.

There are no errors assigned in the record; therefore the Court cannot look into the statement of the case; it can only examine the judgment roll. (*Sayre v. Smith*, 11 Cal. 129; *Barrett v. Tewkesbury*, 15 Cal. 354; *Reynolds v. Lawrence*, 15 Cal. 359; *Dobbins v. Dollarhide*, 15 Cal. 374.)

The bills on their face are addressed to the "Lake Bigler Company." As to admission of explanatory evidence, see *Sayer v. Nichols*, 7 Cal. 535; *Haskell v. Cornish*, 13 Cal. 45; *Shaver v. Ocean Mining Co.*, 21 Cal. 45; *Hicks v. Hinde*, 9 Barb. 528; *Mott v. Hicks*, 1 Cow. 514; *Brockway v. Allen*, 17 Wend. 40; *Randall v. Van Vechten*, 19 Johns.; *Skinner v. Dayton*, 19 Johns.

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548, 554; *Bank of Columbia v. Patterson*, 7 Cranch. 299; 2 Cowen & Hill's Notes, 1358; *Persil v. Dickinson*, 1 Mason's R. 10-12; *Storer v. Logan*, 9 Mass. 65; *Bank of Alexandria v. Bank of Columbia*, 5 Wheaton, 326.

The conduct of the company in paying the drafts of Ives and Garrett authorized the public to conclude they had full authority to draw bills. (See Story on Agency, secs. 239-95, 260; Paley on Agency, 280, 282, 165; *Allen v. Steam Navigation Company*, 22 Cal. 28.)

In this case the associates are sued by their individual names, as well as the company by its company name. This suit is not brought under the provisions of Section 581 of the Practice Act; it comes under the provisions of the Act of 1862, sec. 1, p. 120. The mode of entering judgment against joint debtors is prescribed by Section 32 of the Act of 1861.

Opinion by LEWIS, C. J., full Bench concurring.

We have not yet held a statement of the grounds upon which the appellant relies indispensably necessary before he can be heard in this Court, though we have often intimated that if it were omitted we would not feel disposed to search through a voluminous record for errors committed in the Court below. The neglect of so clear a requirement of the statute and of the rules of this Court is utterly inexcusable, and deserves no indulgence from the Court. Where, however, it is possible, we are always disposed to protect litigants from all costs and expense which might arise from negligence in the preparation of cases for this Court. The statement on appeal shows the rulings of the Court below and the exceptions taken; and heretofore in such cases we have taken such exceptions as an assignment of errors. As the Court has heretofore countenanced this loose practice, we do not feel justified in enforcing the strict rule until after the members of the profession have been notified that such shall be done. The principal questions on this appeal arise upon the ruling of the Court below admitting in evidence the bills of exchange upon which the action is brought. Several objections were interposed to their introduction, only one of which it will be necessary to examine, viz: that the bills were not the paper of the defendant or defendants mentioned in the com-

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plaint. These bills, which are three in number, are in the following form :

“LAKE BIGLER ROAD COMPANY, }
Carson, January 15, 1864. }

“\$2000. Four months after date, pay to the order of Messrs. Gillig, Mott & Co., Two Thousand Dollars, with interest at two and one-half per cent. per month till paid, value received, and charge the same to the account of

BUTLER IVES, Superintendent.

“To J. E. Garrett, Secretary, Carson.”

We find that each draft is accepted by the drawer in the following manner: “J. E. Garrett, Secretary L. B. R. Co.” It is claimed by the plaintiffs that the drafts were given by the Superintendent of the Lake Bigler Road Company, and accepted by the Secretary, for goods furnished the company, and that their officers had the authority to bind the company by drafts of this kind on the Secretary. Upon the trial, an effort was made to establish their authority, after which the drafts were offered in evidence, objected to by the defendant, and admitted by the Court. Of this ruling the defendant complains: first, because it is claimed the bills themselves do not purport to be the bills of the Lake Bigler Road Company; and second, because parol evidence is inadmissible to charge a person upon a negotiable instrument who is not a party thereto. We agree with counsel, that if there be nothing in the instrument itself indicating an intention to bind the principal, the agent alone is chargeable on the note; but if there be anything on the face of the instrument showing that the person signing it was acting for another, and not for himself, parol evidence is admissible to charge the principal. Upon this point Mr. Story lays down the correct rule, as recognized in all the modern authorities. With respect to contracts not under seal, he says: “It is very clear from the authorities that it is not indispensable, in order to bind the principal, that such a contract should be executed in the name and as the act of the principal. It will be sufficient if upon the whole instrument it can be gathered from the terms thereof that the party describes himself, and acts as agent, and intends thereby to bind the principal, and not to bind himself.” (Story on Agency, Sec.

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160. See also *The New England Marine Insurance Company v. James De Wolf*, 8 Pick. 56; *Hovey v. Magill*, 2 Conn. 680; Story on Agency, Secs. 154-5; *Pentz v. Stanton*, 10 Wend. 271; *Townsend v. Hubbard*, 4 Hill, N. Y. Rep. 351.) But the authorities certainly do not sustain the learned commentator in the more comprehensive doctrine which he says is maintained by the more modern authorities, *i.e.*, "that if the agent possesses due authority to make a written contract not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal be known or unknown, he, the agent, will be liable to be sued, and be entitled to sue thereon, and his principal also will be liable to be sued, and be entitled to sue thereon in all cases, unless from the attendant circumstances it is clearly manifest that an exclusive credit is given to the agent, and it is intended by both parties that no resort shall in any event be had by or against the principal upon it." (Sec. 160.) Few, if any of the authorities cited support this proposition of the text. It will be found upon examination that those cases, where the principal had been charged when there was a written contract not disclosing an intention to charge the principal, or which was executed in the name of the agent, the action was not based upon the written instrument, but upon the transaction between the agent and the third party, independent of the written contract. As, for example, where an agent purchases goods for his principal, and gives a note signed by himself for the consideration money, an action could not be maintained against the principal upon the promissory note; but the vendor of the goods might repudiate the note and maintain his action for goods sold and delivered against the principal. Parol evidence would not be admissible to vary or contradict the written instrument by making the contract of the agent that of the principal. Most of the cases cited by Mr. Story in support of the more comprehensive doctrine which he speaks of, are cases of that character, and not actions brought on the written instrument. Doubtless, most of the apparent conflict and confusion in the authorities arise from a failure to make this distinction—a point which Mr. Justice Story certainly did not seem to observe in the authorities cited by him in support of his text. The dictum of Baron Park, in *Higgins v. Senior*, 8 Merson & Wils. 834, that

parol evidence is admissible to charge the principal upon a written contract, which in no wise purports to be made for or on his behalf, is not supported by reason or authority, and was utterly repudiated and its fallacy completely exposed in the case of *Fenly v. Stewart*, 5 Sandford's R. 101; and the rule maintained that unless the intention to bind the principal appear upon the face of the written instrument, parol evidence is inadmissible to charge him on it. After a thorough examination of the question, the Court say in conclusion that "the distinction appears to be this: where a contract is reduced to writing, whether in compliance with the requisites of the statute of fraud or not, and it is necessary to sue upon the writing itself, there you cannot go out of the writing, or contradict or alter it by parol proof, and consequently cannot recover against a party not named in the writing; but where the contract of sale has been executed, so that an action may be maintained for the price of the goods, irrespective of the writing, there the party who has had the benefit of the sale may be held liable, unless the vendor, knowing who the principal is, has elected to consider the agent his debtor." So in the case of the *United States v. Parmelee*, 1 Paine's C. C. Rep. 252, Mr. Justice Livingston says: "Courts of law, out of their great solicitude to protect the interest of a principal, have gone great lengths in identifying him with his agent or factor, and as a necessary consequence have permitted a suit in his own name, although he be not, except by implication of law, a party to it. *But the Court does not know that such suit was ever sustained on the contract itself, where one in writing took place between the factor and vendor, in which the name of the principal did not appear.*" And the authors of American Leading Cases say in their note to *Taintor v. Pendergast*, that "not only must the name of the person for whom the engagement is entered into appear in the instrument, but a relation of agency between himself and the person making the engagement must be disclosed on its face." (1 American Leading Cases, 628.) These decisions rest on the rules of law, that no person can be charged upon a written contract except those who are parties to it; that in an action upon said contract or agreement the whole liability must be made out on the instrument itself, and that parol evidence is not admissible to alter, add to, or vary it, which is clearly done when it is admitted either to discharge

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one party or to substitute or add another to it. (*Finley v. Stewart*, 5 Sanford's R. 101.) But if the name of the principal and the relation of agency between himself and the person making the engagement is disclosed on the face of the agreement, parol testimony is admissible, to determine the respective liability of the principal and agent. 1 American Leading Cases, 632, where, in the note to *Taintor v. Pendergast*, this whole subject is elaborately and learnedly reviewed. Indeed, the entire current of authorities seems to be against the dictum of Baron Park and the statement of Mr. Justice Story. (1 American Leading Cases, 626; *United States v. Parmelee*, 1 Paine C. C. Rep. 252; *Newcomb v. Clark*, 1 Denio, 226; *Pentz v. Stanton*, 10 Wend. 271; *Fenn v. Harrison*, 3 Tenn. R. 761; *Torbort v. Walton*, 9 N. Y. 571; *Skiffin v. Walker & Rawleston*, 2 Camp. 308; *Emily et als. v. Lye et als.* 15 East. 6; *Stackpole v. Arnold*, 11 Mass. Rep. 27; *Mayhew v. Prince*, 16 Mass. 54; *Finley v. Stewart*, 5 Sanford's Rep. 101; *Bradlee v. Boston Glass Manufactory*, 16 Pick. 347; *Alfredson v. Ladd*, 12 Mass. R. 173; *Menard v. Reed*, 7 Wend. 68; *Spencer v. Field*, 10 Wend. 87; *Task v. Roberts*, 113 Monroe, 201; *Packard v. Nye*, 2 Metcalf, 47; *Barker v. The Bedford Cmn. Insurance Company*, 3 Met. 442; *Thomas v. Bishop*, 2 Stru. 955; *Barker v. The Fire Insurance Company of New York*, 3 Wend. 94.) Nor does the case of a dormant partner bear any analogy to that of mere naked agency. When an action is maintained against such partner upon an instrument executed in the name of his partners or in the name of the firm, it is upon the ground that the name employed is a representative name, and he is charged as having contracted under that name, and parol testimony is admissible to show that he has adopted such name, or that he is a member of the firm in whose name the contract is executed. Not so, however, when the agent executes a contract in his own name. (1 American Leading Cases, 634.) It cannot be said that the principal has adopted the name of his agent, except perhaps in certain kinds of contracts hereafter referred to. It will be observed, also, that this is the rule adopted in cases of written contracts not under seal. When the instrument is required to be under seal, a much stricter rule is observed. (*Elwell v. Shaw*, 16 Mass. 42.)

It remains to be determined, then, whether the bills upon which

this action is brought upon their face sufficiently indicate the intention of the agents to act for and on behalf of the Lake Bigler Road Company. If not, they must fall within the rule adopted in the cases above cited, and the company could not be charged upon them. After a careful examination of the authorities upon the question of what, in cases of this kind, is sufficient to indicate the agency so as to charge the principal, we conclude that the agency of Garrett, and his intention to act for the company only, is sufficiently apparent from the instruments themselves, and that if his authority to execute such instruments be established, the Road Company is holden upon the bills. It is a patent fact, observable in the more modern authorities, that there is a growing disposition to favor such construction of any words which may be used in written instruments executed by an agent, and from which an agency may be inferred, as will make the instrument the contract of the principal, rather than that of the agent.

Perhaps out of a laudable desire to carry out the real intention of parties to mercantile transactions, Courts have in many cases gone beyond the sanction of the strict rules of law; nevertheless, when, from a fair construction of an instrument not under seal, an intention is evident to act for and on behalf of the principal, and that fact is known to the party with whom the contract is made, we think the principal, and not the agent, should be holden upon it. Contracts by factors, insurance agents, and ship masters, executed in their own name, are exceptions to the rule, as we have stated it; the principals in such cases are holden upon the same principle as the dormant partner. It has become a custom for those classes of agents to contract in their own names, and the principal is therefore presumed to authorize them so to execute all contracts on their behalf; (Story on Agency, Sec. 162, *Id.* 164) and as these agents usually have a personal interest in the contract, the agent or principal may sue or be sued upon it. Whether this exception is well founded or not we do not pretend to say. The Courts have, however, made the exception; the decisions upon these classes of contracts are, therefore, not authority in a case of this kind.

No one can look at the bills upon which this action is brought without at once conceding that the acceptance was on behalf of the company. They are headed "Lake Bigler Road Company," signed

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by "Butler Ives, Supt.," and accepted by "J. E. Garrett, Sec'y L. B. R. Co." The bill appears to us to be the draft of Butler Ives on the Lake Bigler Road Company, and that the acceptance was by Garrett, on behalf of the company, acting as its Secretary.

It is in the form of a request, made to the company through its Secretary, to pay the sum mentioned therein to the payees, and to charge the same to the account of Ives, and the company accepts it by its Secretary. We think, therefore, that there is sufficient on the face of the instrument to charge the company on the acceptance. It is impossible to reconcile all the cases upon the question of what facts will be sufficient in law to establish the intention to bind the principal; but there are many, wherein it is held that such intention is established by facts much less conclusive than those presented here. In *Hovey v. Magill*, 2 Conn. 680, which was an action on a promissory note, drawn by an agent of an incorporated company, and began, "I promise," and was signed in his own name, as agent of the company, Swift, C. J., delivering the opinion of the Court, said: "When an agent, duly authorized, subscribes an engagement in such a manner as to manifest an intent not to bind himself, but to bind the principal, and when, by his subscription, he has actually bound the principal, then it is clear the contract cannot be binding on him personally.

"It will be agreed that no precise form of words is required to be used in the signature; that every word must have an effect if possible, and that the intention must be collected from the whole instrument taken together. Who can entertain a doubt upon reading the note in question that it was the intention of the defendant to bind the company, and not himself? It is, however, said that he made use of the expression 'I promise,' which is in terms a personal undertaking; but he has qualified it by adding his character of agent, which unequivocally shows that he did not mean to bind himself. * * * I can see no reason for the addition of agent, but to render the note obligatory on the company, and exclude the idea of individual liability; this is the plain language of the transaction, and we ought to give it the obvious meaning, and not entrap men by the mere form of words.

"This mode of signing the note will fairly admit of this construction: I, as agent of the company, pledge their credit, or give their

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promise to pay the note; or, the company, by me as their agent, promise to pay it. But if we consider the word 'agent' as merely *descriptio personæ*, we give it no operation, and really expunge it from the writing. We are bound, however, to give effect to every word, if possible, and the only way to give this word any effect is to make the note binding on the company."

This is going much further toward charging a principal upon such instruments than we feel disposed to go, though the opinion is sustained by numerous well considered cases. (*Bondell v. Van Vestilia*, 19 John. 60; *Sayer v. Nichols*, 7 Cal. 535; *Haskell v. Comish*, 13 Cal. 45; *Dispatch Line of Packets v. Bellowy Manufacturing Co.* 12 N. H. 205; *McCall v. Clayton Busbee*, 422; *Proctor v. Webber*, D. Chif. 371; *Roberts v. Batten*, 14 Vt. 195; *Shelton v. Darling*, 2 Conn. 435; *Johnson v. Smith*, 21 Conn. 627; 1 Parsons on Bills and Notes, 99.)

We do not think the mere fact of placing the word "agent" after the name of him who signs the instrument is sufficient to make it the contract of the principal. If, however, in addition to that, the name of the principal appears upon the face of the instrument, and by a fair and reasonable interpretation of the whole contract it is apparent that the agent intended to bind the principal, whose name so appears upon the instrument, and not himself, the Courts should give effect to such intention. There should always be sufficient in the written instrument itself, without recourse to evidence outside, to make it at least reasonably certain that it is the instrument of the principal whose name appears in the contract. It is perhaps, impossible to lay down any general rules which will govern all cases of this kind. Whether the intention to bind the principal is apparent upon the face of an instrument is a question which must be determined by the peculiar facts of each case considered in the light of practical philosophy; for the law is preëminently a practical science. It deals with the transactions of a man as it finds them, and judges of his motives and purposes not by some metaphysical or speculative theories, but by those philosophical principles which are drawn from his daily action or conduct. If we look upon the bills presented in this case and judge of the intention of the parties rather by what they have in fact done, than by what they should have done, there can be no doubt of the fact that they were drawn

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on the Lake Bigler Road Company, and accepted by its Secretary on its behalf. We are unable to see the distinction which the learned counsel for appellants attempts to make in the effect to be given to the word "Superintendent" or "Secretary" written after the name of the person executing an instrument, and the word "Agent." The word "Superintendent" or "Secretary" as clearly indicates the relation of agency and an intention to represent another as the word "Agent," and, whilst we do not pretend to say that any of those words written after the name of a person executing a written instrument, and unconnected with anything else, would be sufficient to show the agency, yet if there be other words and expressions used which also tend to show such agency as in this case, and the form and nature of the contract is such as to bind the principal, we think he should be holden instead of the agent.

It is claimed, however, that Garrett had no authority to bind the company by the acceptance of paper of this kind.

It is clear from the written authority entered upon the books of the company that no power to sign bills or notes could be included in it; but it appears from the evidence in the transcript that the company frequently sanctioned the acceptance of such bills by the Secretary, and that similar bills had been given to the plaintiffs and paid by the company. These facts of themselves are sufficient to establish the authority of the agents so far as the plaintiffs in this case are concerned, for it is a familiar rule of the law of agency that where an agent is in the habit of doing certain acts on behalf of his principal, and they are sanctioned by the principal, the agent is presumed to possess the authority to do such acts in similar transactions, and in the course of the same business. (Story on Agency, secs. 55, 56.)

Thus says Chancellor Kent: "Where a person sent his servant to a shopkeeper for goods upon credit, and paid for them afterwards, and sent the same servant again to the same place for goods and with money to pay for them, and the servant received the goods but embezzled the cash, the master was held answerable for the goods; for he had given credit to his servant by adopting his former act."

So where a broker had usually signed policies of insurance for another person, or an agent was in the habit of drawing bills on

another, the authority was implied from the fact that the principal had ratified and assumed the acts, and he was held bound by repetition of such acts, where there was no proof of notice or any revocation of power or of collusion between a third party and the agent. (2 Kent, 851.)

The Lake Bigler Road Company having at various times before the execution of the bills of exchange upon which this action is brought sanctioned the authority of Garrett in similar transactions, they must be holden on their bills upon the law as enunciated by Chancellor Kent.

Neither can we agree with counsel for appellant that the only judgment which can be rendered for plaintiffs in this case is a judgment against the joint property of the company.

Section 1 of an Act entitled "An Act relating to the manner of commencing civil actions," laws of 1862, page 120, provides that "in all actions hereafter brought on contract, the defendants may be sued by the name or style under which the contract was made, and upon its being shown on the trial who are the persons of whom the name or style is descriptive, judgment may be rendered against them as now provided by law."

The defendants in this action were sued under the name of the Lake Bigler Road Company, and upon the trial, proof was introduced to show who composed the company; and judgment was rendered against the company, and also against the individual members served with summons, which was in accordance with Section 32 of the Practice Act as it existed at the time of the passage of the Act of 1862; but it is claimed that this was error. First, because the contract upon which the action is brought is not made in the name of the Lake Bigler Road Company; and, second, because the words "judgment may be rendered against them as now provided by law," in Section 1, above referred to, only authorized judgment against the company *in solido*, for it is said the law at that time provided for no other kind of judgment in cases of this kind. In our opinion the contract of acceptance upon the bills is in the name of the company.

As we have stated before, the drafts are drawn by Ives on the Lake Bigler Road Company, and accepted by it through its agent, the Secretary.

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That the acceptance by Garrett, though not in the proper form, is in effect the same as if he had signed it "Lake Bigler Road Company, by J. E. Garrett, Secretary."

We think counsel equally in error in his second objection. It is perfectly clear, from the language of Section 1, that it was the intention to enable the plaintiff to recover a judgment which could be enforced against the individual members of companies sued by their company names; otherwise, whence the necessity of proving who are the persons composing such company?

If judgment in such cases can only be rendered against the company, the adoption of the section was utterly useless, for such cases were already provided for by Section 581 of the Civil Practice Act. And if judgment in an action upon a contract executed in a company name can only be rendered so as to charge the company properly, we ask whence the necessity of "showing on the trial who are the persons of whom the name or style is descriptive."

The evident intention was to authorize judgment as provided by Section 32 of the Practice Act, when it was shown who the persons were composing the company.

The judgment was so entered and must be affirmed.

9	226
11	107
15	81

2	226
22	356
2	226
26	450

2	226
26	216

STATE OF NEVADA, RESPONDENT, v. NATHANIEL L. SQUAIRE, APPELLANT.

The sections of the Criminal Practice Act which require the Sheriff to make return of the venire issued for the trial jurors at least two days before the commencement of the term—that the Judge and Assessor shall make certificate of the names drawn by them to act as jurors, and the section requiring the Judge and Assessor to select the names of two hundred persons, *lawfully qualified to serve as jurors*, are only directory. A judgment will not be reversed for a failure to strictly comply with those sections, unless it shall appear that the defendant may have been injured by such failure.

It was not the intention of the Legislature to require the Judge and Assessor to pass on the qualifications of each person in selecting names out of which to form a jury.

The names should be selected from the assessment roll. As to the qualifications of those selected, that could not be passed on at the time of selection.

The failure to return the panel at the time required could not prejudice the defendant, if he had ample time after the return to inspect the panel.

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All the three sections referred to are qualified by Section 323 of Criminal Practice Act.

This Court cannot review the action of the Court below in disallowing a challenge for cause when the party objecting makes no specification as to the nature of the objection upon which he interposes the challenge. The party challenging should specify the grounds of his challenge.

It is error to allow a jury to disperse after impanelment without the consent of the prisoner. But a jury is not properly impaneled until they are sworn and charged with the case.

When an instruction is asked and refused, which contains a correct principle of law, but there is nothing in the record showing its applicability to the case on trial, this Court cannot reverse the judgment. The refusal may have been on the ground that there was nothing in the testimony making the instruction applicable to the case.

One may be principal in the crime of arson who does not himself apply the torch; if he be present aiding and abetting, he is a principal. An instruction which assumes that the defendant could only be principal if he himself set the fire is erroneous, and should not be given.

APPEAL from the District Court of the Second Judicial District, the Hon. S. H. WRIGHT presiding.

The facts appear in the Opinion.

I. Atwater, for Appellant.

The Court erred in overruling defendant's objection to the panel, that the Sheriff had not made his return until the first day of the term. (Statutes 1864-5, p. 137, sec. 3.)

The Court erred in overruling the objection to the panel, that the Judge and County Assessor had failed to return the proper certificate of the drawing of the jury as by law required. (Page 137, sec. 2, of Laws of 1864-5.)

The Court erred in overruling the challenge to the panel, that it had not been drawn according to law. (Statutes of 1864-5, p. 137, sec. 1; Statutes of 1864-5, p. 140, sec. 18; Statutes of 1864-5, p. 386, sec. 17; Statutes of 1861, p. 468, sec. 323; *Gardner v. Turner*, 9 John. 260; *Wood v. Stoddard*, 2 John. 194; 20 Conn. 510; 11 U. S. Digest, p. 288, sec. 4; *Pringle v. Huse*, 1 Cow. 432.

The Court erred in overruling challenge for cause to jurors Little, Wilkin, and Van Orman. (*People v. Bodine*, 1 Denio, 281, 304; *Freeman v. People*, 4 Den. 9, 23, 35-6; *Monroe v. State*,

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5 Georgia, 85; *Ex parte Vermilyea*, 6 Cow. 555 to 565; *Id.* 7 Cow. 122; *Davis v. Allen*, 11 Pick. 466; *Canumi v. People*, 16 N. Y. 501; Statutes of 1861, p. 470, sec. 339; *People v. Reyes et al.*, 5 Cal. 346; *People v. Gehr*, 8 Cal. 361-2.)

The Court erred in allowing the jury to separate after impanelment without consent of parties. (Statutes of 1864-5, p. 139, secs. 12 and 14.)

The Court erred in refusing the second, third, and fourth instructions asked by defendant. (Statutes of 1861, p. 57, sec 10; Archibald's Crim. Pl. Vol. 1, p. 14; *Conrad v. Lindley*, 2 Cal. 173; *Russell v. Amador*, 3 Cal. 403; 3 Miss. 166.)

Thomas E. Haydon, Prosecuting Attorney for Ormsby County, for Respondent.

Section three, page 137 of Acts of 1864-5 is merely directory. The object was to give time to examine the panel. This object was fully attained by deferring all criminal trials to the second week of Court.

The Court will not reverse a cause for mere technical error when no injury is done. (Laws of 1861, p. 499, sec. 589; Laws of 1861, p. 487, sec. 487.)

The Transcript shows a substantial compliance with the law requiring a certificate of the drawing of the venire, and also a substantial compliance in other respects with the law.

The answers of the jurors showed no legal disqualification. There was no challenge for actual bias.

A jury is not impaneled until it is sworn and charged with the cause. (Wharton, Vol. 1st, sec. 590-3; Laws of 1861, p. 380.)

The second instruction was properly refused. An accessory is to be indicted, tried, and punished as a principal. (Laws of 1861, p. 57, sec. 10; Laws of 1861, p. 462, sec. 252; *People v. Bearss*, 10 Cal. 69; *People v. Davidson*, 5 Cal. 133.)

The Court properly refused the third instruction, because if the prisoner was standing by, aiding and abetting, he was as much guilty as if he applied the torch.

The fourth instruction, not being founded on any existing fact, would only have confused the jury, and was therefore properly refused.

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Opinion by LEWIS, C. J., full Bench concurring.

Before the trial jury were sworn in this case, the defendants interposed a challenge to the panel, upon the grounds: first, that the Sheriff did not make return to the venire until the first day of the term; second, because there was no certificate of the District Judge and County Assessor of the drawing of the jury as required by law; and third, because some of the jurors selected by the Judge and Assessor were not registered voters, and hence incompetent to act as jurors.

Section 3 of an Act concerning Jurors, approved February 8th, 1865, makes it the duty of the Sheriff to return the venire issued for the trial jury at least two days prior to the day fixed by law for the commencement of the term of Court; Section 2 of the same Act makes it the duty of the Judge and County Assessor to certify to the list of names drawn by them to act as jurors at any term of the Court; and the first section provides that the District Judge of the district and the County Assessor of the county in which a term of the District Court is, or may be authorized by law to be held, shall, at least ten days prior to the commencement of said term of Court, and at the court-house, publicly and alternately select the names of two hundred persons, *lawfully qualified to serve as jurors, from the assessment roll of such county.*

In answer to the objections of counsel for the defendants; it is sufficient to say that the provisions of these three sections are merely directory, and unless the irregularity in the execution of them be such as would be likely to prejudice the defendants, it will not be a good ground of challenge.

It could not have been the intention of the Legislature to make it the duty of the Judge and Assessor to pass upon the qualifications of each person selected by them to act as jurors, for that were to require an impossibility. It could not be done. And even if, as suggested by counsel, the names were taken from the register of voters, it would not necessarily follow that persons thus selected would be qualified to act as jurors. The obvious purpose of the Legislature was to have all juries selected from among the residents and taxpayers of the county in which they are to perform their duties. Hence, it is made the duty of the Judge and Assessor to se-

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lect the names of two hundred persons from the assessment roll, and in our opinion their qualifications to act as jurors, beyond the fact of their names appearing upon the assessment roll, are not to be passed upon by the Judge or Assessor.

We cannot see that the failure of the Sheriff to return the venire two days prior to the time fixed for the commencement of the term prejudiced the defendants. The principal object of that requirement is to give parties an opportunity of inspecting the panel.

The defendants had ample time to inspect the venire before the trial; therefore, they cannot complain of having been injured by the failure to file the venire within the proper time. These requirements, so far as this case is concerned, must be construed in connection with Section 323 of the Criminal Practice Act, which declares that "a challenge to the panel can only be founded on a material departure from the forms prescribed by statute in respect to the drawing and return of the jury, or on the intentional omission of the Sheriff to summon one or more of the jurors drawn.

The errors here complained of are entirely immaterial. We therefore, conclude that the challenge of the defendants was properly disallowed.

Upon the challenges to the jurors Little, Wilkin and Van Orman, we cannot say that the Court below ruled incorrectly; for the challenges were interposed in general terms, "for cause," without a specification of the particular grounds.

Challenges for cause are numerous; some of which are to be tried by the Court, and some by triers. Challenges for cause may be taken: 1st, when the juror has been convicted of felony; 2d, for a want of any of the qualifications prescribed by statute to render a person a competent juror; 3d, unsoundness of mind, or such defect of the mind, or the organs of the body, as renders him incapable of performing the duties of a juror. These are general causes of challenge, and are triable by the Court. Particular causes of challenge are: 1st, for such a bias, as when the existence of the facts is ascertained, the judgment of the law disqualifies the juror, which includes the numerous cases of implied bias, and is triable by the Court; 2d, for the existence of a state of mind on the part of the juror, in reference to the case, which leads to the inference that he will not act with entire impartiality in the trial. This is

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called actual bias, and is to be determined by triers. When a challenge is interposed in general terms, as in this case, how is the Court to know the ground of challenge? whether it is for some general cause, or particular? whether for implied or actual bias? To enable the Court to act understandingly, it is necessary to state the particular grounds of the challenge. If that be not done, the Appellate Court cannot determine whether it was properly disallowed or not. In the case of *Paige v. O'Neil*, 12 Cal. 480, Mr. Justice Field, in delivering the opinion of the Court, says of a challenge for cause: "It is not sufficient to say 'I challenge for cause,' and then stop, as in this case. The ground upon which it can be sustained, if at all, must be stated." So in 2 *Graham and Waterman on New Trials*, 473, it is said: "When a juror is challenged for principal cause, or for favor, the ground of the challenge must be distinctly stated; for without this the challenge is incomplete, and may be wholly disregarded by the Court. It is not enough to say, 'I challenge for principal cause, or for favor,' and stop there; the cause of the challenge must be specified."

In *Mason v. Glover*, 2 Green's Rep. 195, the Court says: "A party cannot make a principal challenge, or a challenge to the favor, by giving it a name. A challenge, whether in writing or by parol, must be in such terms that the Court can see, in the first place, whether it is for principal cause or to the favor, and so determine by what form it is to be tried; and, secondly, whether the facts, if true, are sufficient to support such challenge." Again: the challenge must "state why the juror does not stand indifferent; it must state some facts or circumstances which, if true, will show either that the juror is positively and legally disqualified, or create a probability or suspicion that he is not or may not be impartial. In the former case, the challenge would be a principal one, triable by the Court; in the latter, it would be to the favor, and submitted to triers."

The fourth ground of error assigned by appellant is, that the Court erred in allowing the jury to separate after impanelment, without the consent of the parties.

In support of his position, counsel relies upon Section 12, p. 139, of the Statutes of 1864-5, which declares that "after the impanelment of the jury shall be completed in any case, it shall be the

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duty of the Judge to order the jury into the custody of the Sheriff, or other officer selected by the Court; nor shall the jurors be allowed to separate or depart from the custody of the Sheriff or said officer, nor be allowed to communicate with any person, until they shall have been duly discharged, unless by consent of the parties to the action."

We fully agree with the counsel, that it would be error to allow the jury to separate after the impanelment is completed, unless by consent of parties; but in this case no such separation was allowed. It appears that, before the jurors were sworn or charged with the cause, the Court allowed them to separate; but not after they were so sworn. In our opinion, the impanelment is not complete, as contemplated by the section above referred to, until after they are sworn and charged with the case. Until that time, the right of peremptory challenges usually continues, and it will be observed from the language of the Statute that the impanelment is not deemed complete until the jury is ordered into the custody of the executive officer of the Court; and he is sworn to keep them together, and suffer them to have no communication with any other persons. It was evidently not the intention to have the jury ordered into the custody of the Sheriff until they had been charged with the cause, and until the opportunity for all challenging had passed. For it would be utterly inconsistent to order the jury into the custody of the officer before they are charged with the cause, swearing him at the same time to keep them together "until they agree upon their verdict, or are discharged according to law;" whilst it is still in the power of counsel to peremptorily challenge one or all of the jurors so placed in his keeping. If, as we believe, the jury should not be ordered into the custody of the executive officers of the Court until they are sworn, it follows that the Statute only prohibits a separation after they are so sworn, for it declares that they shall not be allowed to "*separate or depart from the custody of the Sheriff*" until they have been duly discharged. As the record shows no separation of the jury after they were so sworn, we conclude that this objection of counsel for appellant is not well taken.

The fifth assignment of error is upon the ruling of the Court below in refusing to give the following instruction, asked by defendant, to the jury:

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“ If the jury find from the evidence that the defendant, Squires, was only knowing or accessory to the crime of burning the said building, then he must be acquitted under this indictment.”

It is unnecessary in this case to determine whether this instruction was correct or not, or whether under proper proof it should have been given or not ; because there is nothing in the record before us to show that it was pertinent to the proof. If upon the trial no effort was made, and no evidence was introduced, tending to place the defendant in the position of an accessory, it would have been perfectly proper for the Court below to refuse to give the instruction. The purpose of instructions is to declare the law governing some issue of fact established, or attempted to be established at the trial. Hence, it is always necessary, not only that the instructions asked by either party announce a correct rule of law, but it must be warranted by the evidence. When, therefore, the refusal to give an instruction is complained of, it is as necessary to show its pertinency to the evidence as that it correctly states the law. In the case of the *State of Nevada v. Waterman*, 1 Nevada, 544, this Court held that when an instruction containing a correct legal principle is refused, and that there is nothing in the Transcript on Appeal to show whether it was or was not applicable to the case in which it was asked, the Appellate Court may presume that the refusal was upon the ground that it was not applicable. We cannot say, therefore, that the Court erred in refusing the instruction referred to.

It is also claimed that the Court erred in refusing to give the following instruction, asked by the defendant :

“ If the jury, from the evidence, have a reasonable doubt as to whether the defendant Squires set the fire to the building mentioned in the indictment, from which the building was consumed, that doubt must be given to the benefit of the defendant.”

This instruction was properly refused. A doubt as to whether the defendant “ *set the fire to the building* ” would not necessarily render it doubtful as to whether he was guilty, even as principal, in the offense for which he is indicted ; for, though he may not have set the fire, he may have been present, encouraging, instigating, and abetting others to set the fire. In such case, though he did not apply the torch himself, he would be principal in the crime. So,

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too, if he merely stood near to watch and give the alarm, in case of apprehended detection. (2 Russell on Crimes, 26.) And yet counsel assume in the instruction (and if given, the jury could have drawn no other conclusion from it) that if they had any doubt as to whether the defendant actually set the fire, they should acquit him, notwithstanding he may have been present aiding and abetting those who did apply the torch. It seems to have been the assumption of counsel that defendant could not be a principal in the crime unless he personally set the fire. This is a mistake. (Statutes of 1861, p. 462, section 252.) Even at common law, all who were *present*, encouraging, aiding, and abetting, or stood ready to afford assistance, if necessary, were considered principals, either in the first or second degree. (1 Russell on Crimes, 25-27.)

This instruction was, therefore, properly refused; and the judgment of the Court below must be affirmed.

JOHN ARNOLD ET AL., RESPONDENTS, v. C. C. STEVENSON, APPELLANT.

One partner cannot bind the interest of his copartner in real estate by mortgage. The deposit for record of a revocation of a power of attorney in the proper office operates under our statute as a notice to all parties dealing with the attorney. By such deposit, the revocation becomes absolute without actual notice to the attorney.

APPEAL from the District Court of the First Judicial District, Storey County, Hon. R. S. MESICK presiding.

W. H. Cluggett, for Appellant.

There is no equitable lien in favor of the mortgagees. This equitable lien only arises in marshaling the assets of any insolvent firm, and is worked out by the equities existing between the partners, and not otherwise. (See Story's Equity, vol. 2, secs. 1,252, 1,253.)

The complaint is framed to enforce a mortgage, and not an equitable lien.

If we admit the debt to have been a partnership debt, still Coover could not execute a mortgage on joint property to secure that debt.

(Story on Agency, sec. 125; Collyer on Partnership, secs. 462-466.)

This mortgage can only be sustained by holding that Coover had an unrevoked power of attorney when it was executed.

This power was revoked even according to common law principles. Notice to the attorney is revocation so far as he is concerned. It is revoked as to those dealing with an attorney when they receive notice.

Notice may be implied; and when a purchaser or mortgagee buys without the exercise of ordinary prudence, and without investigating those facts which it was his duty to have investigated, notice may be implied. (See 4 Kent, 172 and 179; 6 Wend. 226; 3 Metcalf, 405; 5 Binny, 314; Hoffman's Ch. 366, 372 and 373; 3 Mylne & Keene, 699; 1 Smith, [15 N. Y.] 354.)

It was the duty of respondents to have examined the record to ascertain whether the power of attorney was revoked. Failing to do so was gross negligence.

The plaintiffs had constructive notice. Whatever instrument the law required to be recorded gives constructive notice. (See Hoffman's Ch. 368, 370; 2 John. 522-524; 3 Cal. 179; 6 Barb. 69-75; 4 Cowan, 605.)

That the Court could extend the time for serving notice of new trial. (See 5 Cal. 62.)

Reardon & Hereford, for Respondents.

The power of attorney was not revoked. The statute requiring the recordation of revocations does not dispense with the common law requirement of notice to the attorney. Until such notice, there is no revocation in fact. The statute makes another requirement, in addition, that the revocation shall not take effect until recorded. The recording of a revocation before absolute notice to the attorney, is simply a nullity. At common law the giving of notice was revocation. Here the revocation is made by giving a *written* notice and filing a copy for record.

This was a mortgage of partnership property to pay a partnership debt. It is within the power of one partner to execute such a mortgage. (Washburne on Real Property, pages 442 and 159;

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Story on Partnership, sec. 93 ; Story's Equity Jurisprudence, sec. 674.)

Opinion by LEWIS, C. J., full Bench concurring.

This action was brought to foreclose a mortgage executed as follows :

“ Charles S. Coover, C. C. Stevenson,—by Chas. S. Coover, his attorney in fact.”

The pleadings and finding of facts by the Court show that at the time the debt was contracted and the mortgage executed, the defendants Coover and Stevenson were copartners in a certain quartz mill located at Gold Hill, in the County of Storey ; that the defendant Stevenson, on the seventh day of March, 1863, executed to Coover a power of attorney, whereby he was fully empowered to execute the mortgage upon which this action is brought ; that this power of attorney was duly recorded on the tenth day of March ; and that on the fourth day of December, A.D. 1863, Stevenson deposited for record in the same office where the power of attorney was recorded an instrument revoking the power of attorney. Immediately after this was done, he left for the Atlantic States, without giving his agent notice of the revocation, or taking any steps to inform the public of it. On the twenty-second day of January, A.D. 1864, about a month and a half after the revocation had been recorded, the defendant Coover executed the mortgage in the manner above mentioned on the quartz mill owned by himself and Stevenson.

It seems to be conceded that neither the agent nor the plaintiffs had actual notice of the revocation until after the execution of the mortgage. Stevenson now defends this action, claiming that at the time of the execution of the mortgage, the power of attorney had been revoked, and that Coover's execution of it on his behalf was therefore unauthorized.

Judgment was awarded in favor of the plaintiffs in the Court below, and the mortgaged premises were decreed to be sold to satisfy the plaintiffs' demand.

In support of this decree, counsel for respondents takes the position here : 1st. That as a partner of Stevenson, Coover possessed the authority to execute the mortgage ; and 2d. That the power of

attorney was not revoked by the mere deposit for record of the instrument of revocation, but that to complete the revocation it was necessary to give actual notice to the agent and to those with whom he dealt.

We are unable to agree with counsel upon either of these propositions.

If Coover, by virtue of the partnership relations, had the power to convey or mortgage the real estate of the partnership, the manner in which he signed the deed, so long as it was executed for and on behalf of the firm, would be a matter of little or no consequence. If he possessed the authority to sign the firm name of Coover & Stevenson to the deed, and thereby convey the interest of his copartner, the instrument would doubtless be as effectively executed by the signing of his own name and that of his partner, as he did in this case, as if he had signed the partnership name to it. But it is unnecessary to discuss that question, for the law is clear and emphatic that the agency resulting from partnership relations does not authorize one partner to dispose of the real estate of the firm. The general implied powers of a partner do not extend to binding the firm by instruments under seal. (*American Leading Cases*, 449; *Id.* 499.)

Courts of Equity, for some purposes and to some limited extent, hold that the real estate of the partnership is subject to the same rules that govern the stock in trade. It is so held for the purpose of making it subject to discharge the partnership liabilities in preference to the personal liabilities of the individual partners, and also for the purpose of giving the creditors of the firm and the continuing or surviving partner a lien upon it for partnership indebtedness; but in the note to *Coles v. Coles*, 1 *American Leading Cases*, 499, it is said: "As regards the power of disposition, land held as partnership stock is not subject to the rule which makes each partner the agent of the firm. Neither can sell more than his individual interest unless he have from the other a sufficient special authority for that purpose." We conclude, therefore, that without special authority from Stevenson, Coover had no power to mortgage his copartner's interest in the real estate of the firm.

This brings us to the consideration of the question whether the deposit of the instrument of revocation in the office where the

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power of attorney had been recorded, constituted a complete revocation; or whether it was necessary not only to file such instrument for record, but in addition thereto to give actual notice of the revocation to the agent and those with whom he dealt before the power was extinguished. At common law the revocation became effectual as to the agent from the time he received notice of it, and as to those with whom he dwelt from the time it was made known to them. "Until, therefore," says Mr. Story, in his work on Agency, Section 47, "the revocation is so made known, it is inoperative. If known to the agent as against his principal, his rights are good; but as to third persons, who are ignorant of the revocation, his acts bind both himself and his principal." This notice, as required by common law, it is admitted, was not given in this case, either to the agent or the plaintiffs. It is necessary, therefore, to inquire what effect the statute of this State has upon the requirements of the common law; whether the deposit for record of the instrument of revocation dispenses with all other acts and notice; or whether the Registry Act requires that to be done in addition to the requirements of the common law. After a careful examination of the statute, we are impelled to the conclusion that the deposit for record of the instrument is in lieu of the actual notice required by the common law, and that it dispenses with the necessity of any other notice. Section 24 of an Act of the Legislature of the Territory of Nevada, entitled "An Act concerning Conveyances," approved November 5th, 1861, declares that "every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate, or whereby any real estate *may be affected*, proved, acknowledged and certified in the manner prescribed in this Act, to operate as notice to third persons, shall be recorded in the office of the Recorder of the county in which such real estate is situated; but shall be valid and binding between the parties thereto without such record." By Section 25 it is provided that "every such conveyance or instrument of writing acknowledged or proved, certified and recorded in the manner prescribed in this Act, shall, from the time of filing the same with the Recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers and mortgagees shall be deemed to purchase and

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take with notice." Section 27 of the same Act makes it necessary to record all powers of attorney containing a power to convey real estate in the manner in which other instruments affecting real estate are required to be recorded; and the section following declares that "no such power of attorney or other instrument, certified and recorded in the manner prescribed in the preceding section, shall be deemed to be revoked by any act of the party by whom it was executed, until the instrument containing such revocation shall be deposited for record in the same office in which the instrument containing the power is recorded." If an instrument revoking a power of attorney to convey land is an instrument by which "real estate may be affected," the conclusion would seem to be invincible that the filing of it for record in the office where the power itself is recorded, operates as notice of its contents to all persons with whom the agent may afterward deal on behalf of his principal. This is the effect explicitly given to all such instruments by the twenty-fifth section of the Act before referred to, when they have been filed for record in the proper office.

Is such instrument, then, one whereby real estate, or the title to land, may be affected? The words of the statute are as broad and comprehensive as any general words can possibly be. It will be observed, also, that they include not only those instruments which may immediately affect real estate, but likewise those whereby it may immediately produce the same result. A power of attorney to convey real estate would undoubtedly be included in the general words of Section 24. It is clearly an instrument "whereby real estate may be affected." It was said in *Williams v. Berbick et als.*, (1 Hoffman's Chancery, 369) that words similar to those employed in Section 24 included a power of attorney to assign a mortgage. We are unable to see how an instrument which merely gives the power to sell or convey land can be considered an instrument whereby real estate may be affected, any more than the instrument of revocation, by which not only the power to sell or convey is extinguished, but even titles to land created under that power, may be utterly defeated. Under the power of attorney, real estate may be conveyed; by the instrument revoking that power, the title so conveyed may be defeated. To destroy or defeat a title to land is surely affecting real estate as much as to convey or create a title.

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Until the filing of the instrument of revocation, the authority of the agent to bind his principal as to those dealing with him in good faith is undoubted. A conveyance made by the agent to a *bona fide* purchaser for a valuable consideration, before the revocation is deposited for record, would bind the principal; but suppose such instrument is so deposited for record, and notice of that fact is brought to the knowledge of a person who afterwards purchases from the agent: in such case the instrument of revocation would completely defeat the conveyance to him, and continue it in the principal. Suppose A, the duly authorized agent of B, conveys land to C, after both agent and purchaser are notified that the power of attorney is revoked, but before the instrument of revocation is deposited for record, and C conveys to D, a *bona fide* purchaser, for a valuable consideration, before the instrument is deposited, there is no doubt, we apprehend, that D would get a good title as against the principal; but, if before the conveyance by the agent, the instrument of revocation had been filed, and notice thereof given to the agent and his grantee, in such case it is quite evident that D would get no title whatever from his grantor. In that case, certainly, the direct effect of the instrument would be to defeat the conveyance from C to D, and therefore it seems to us it can easily be included in the broad language of the statute as affecting the title to land, which is synonymous with real estate.

But there is further reason for the conclusion to which we have arrived: Section 28 clearly contemplates that the instrument containing the revocation shall be recorded. It declares that the power shall not be deemed revoked until such instrument is deposited for record. True, it does not in terms require the instrument to be acknowledged, or proved and certified. But the very absence of those requirements in that section, while it requires the instrument to be recorded, shows that the framers of that Act believed it to be included in the general provisions of Section 24.

Again, if it is not one of those instruments mentioned in the twenty-fourth and twenty-fifth sections, and if the filing of it for record does not impart notice of its contents to third persons, why is it required to be recorded at all? The Judge below concludes that the deposit for record is an act to be done in addition to those required by the common law. We

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think not. Unless the intention of the Legislature be obvious, no statute should be so construed as to make it impose onerous duties upon individuals, in addition to those required by the common law, unless it be for the purpose of curing some defect, or affording some remedy in which the common law is deficient. The law upon this subject was complete and perfect, so far as the agent and the public were concerned, before the passage of the Act. It threw every safeguard around the public, and gave the agent ample protection from any negligence or imposition on the part of the principal. The only material defect which seemed to exist in the common law was the failure to give the principal a speedy and convenient means of revoking the power of his agent. It can readily be conceived how difficult it would often be for a principal to protect himself from the acts of an agent whose authority he had revoked, when he was compelled to notify the entire community of the fact so as to bring the knowledge of it home to each individual with whom the agent might deal after his authority had in fact been revoked. It is not improbable that it was this very difficulty which was sought to be remedied by the twenty-eighth section referred to.

The recording of the instrument was evidently intended to operate as a notice to all who might have dealings with an agent. If this be not the object, the law requires a superfluous and useless act to be done, for we can see no other object to be accomplished by it. That requirement is not made merely for the purpose of evidence, for if such were the case, the revocation of the power would not be made to depend upon it. It is made the ultimate and indispensable act by which the revocation of the power is perfected. Without it, the agent's power, to a limited extent at least, continues unrevoked. Indeed, the primary object of all registry law is to avoid fraud by charging all persons purchasing, or otherwise becoming interested in real estate, with notice of the real condition of the title. When, therefore, the statute requires an instrument of this kind to be recorded, it is fair to presume, at least, that it is for the purpose of imparting notice of its contents to third parties, when no other purpose is mentioned; and if it does operate as such notice, where is the necessity of the actual notice to third parties, required at common law?

We have endeavored to show that the instrument of revocation,

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when deposited for record, imparts notice of its contents to all parties dealing with the agent after such filing for record. It is next to be determined whether the statute requires actual notice to the agent, who, it is admitted, is not chargeable with constructive notice by the filing for record of the instrument of revocation. Though the intention of the Legislature is not very clearly expressed, we conclude that the revocation is complete when the instrument of revocation is filed for record, and that no actual notice to the agent is required. We are brought to the conclusion that this was the purpose of the Legislature from the fact that a certain act is required to be done before the power can be revoked; when such act is done, the conclusion is natural that the revocation was intended to be complete. Section twenty-eighth of the Act concerning Conveyances, declares that no power of attorney recorded in the manner prescribed by law, "shall be deemed to be revoked by any act of the party by whom it was executed, until the instrument containing such revocation shall be deposited for record in the same office in which the instrument containing the power is recorded." The inevitable conclusion from this language is, that when the instrument of revocation is so filed, the revocation shall be deemed complete. This, it seems to us, is the best and safest rule to be adopted. If all persons dealing with the agent are chargeable with notice, injury can seldom, if ever, result to the agent, whilst the principal has a speedy and sure means of protecting himself from an evil-disposed servant. Should an agent convey lands after the instrument of revocation has been filed, the purchaser could have no remedy against him, because he is chargeable with notice of the fact that the agent's authority was revoked at the time of the purchase.

Again, if in addition to the filing of the instrument of revocation, the principal is required to give actual notice to his agent, he is placed in a position where he may be ruined by an unscrupulous or malicious agent, who, apprehending an intention to revoke, might avoid his principal so as to defeat his purpose; or even if notice be given, he may deny it. Where the law is as doubtful as it is in this case, we think it the duty of the Court to adopt that construction which will be the least likely to produce mischief, and which will afford the most complete protection to all parties, by taking away the power of committing fraud or doing injury. As all persons deal-

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ing with the agent after the instrument of revocation has been filed for record are chargeable with notice of the fact, we can see no great necessity for notifying the agent, and there are many reasons why notice to him should not be made indispensable to the revocation of the power.

The decree of the Court below, so far as it orders a sale of Stevens's interest in the premises, must be reversed, and it is so ordered.

2	243
6	338
10	494

C. CARPENTER, RESPONDENT, v. J. C. CLARK, APPELLANT.

H., the owner of two mules, keeps them at a public stable, and uses them in hauling for C. C. pays the owner of the stable for keep of mules. Subsequently, C. buys the mules of H., and immediately puts them in a team with other mules of his own, driven by another party in the employ of C. In a few days they are removed from the public stable to C.'s private stable. *Held*, this is an *immediate delivery*, within the meaning of that phrase in the Statute of Frauds.

Several months after the purchase of these two mules by C., he employs H. as a teamster, and sets him to driving a team of eight mules—two of which he had purchased a few months back from H., the others had never been owned by H. The mules were all kept at the stable of C. *Held*, this was not a violation of that clause of the law regarding fraudulent conveyances, which requires a continued change of possession.

APPEAL from the District Court of the First Judicial District, Storey County, Hon. RICHARD RISING presiding.

The facts are stated in the Opinion.

McRae & Rhodes, for Appellant.

There was no immediate delivery of the mules from House to Carpenter. The instructions given by the Court ignore the necessity of such immediate delivery.

The change of possession must be exclusive and immediate. (Chitty on Contracts, page 414, 6th American edition; *Vance v. Boynton*, 8 Cal. 562; *Cheaney v. Palmer*, 6 Cal. 119.)

It must be immediate and continuous. (*Hurlburt v. Bogardus*, 10 Cal. 518; *Engles v. Marshall*, 19 Cal. 320; *Doak v. Brubaker*, 1st Nev. 218.)

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No sufficient change of possession is shown. (*Malone v. Plato*, 22 Cal. 103; *Weil v. Paul*, 22 Cal. 492; *Cahoon v. Marshall*, 25 Cal. 197; *Hill on Sales*, p. 108, Secs. 6, 8, 20.)

If goods be sold and delivered on credit, the title passes to vendee. (*Hill on Sales*, p. 113, Secs. 26 and 29; *Ib.*, p. 122, Secs. 17-21 and 22; *Ib.*, p. 81, Sec. 27; *Chapman v. Lathrop*, 6 Cow. 110.)

On question of fraud: see *Hill on Sales*, p. 114, Sec. 33; *Vance v. Boynton*, 8 Cal. 562.

M. B. Harrison and *Aldrich* and *DeLong*, for Respondent.

By *Harrison*.

The possession of a purchaser need not be continued indefinitely, if the possession is open and notorious, and so long continued as to give notice to the world of change of ownership. (See *Stevens v. Irwin*, 15 Cal. 503; case reaffirmed in 26 Cal., and a later case not yet reported.)

If any of the instructions given were not technically correct, yet it does not appear that they could have been injurious to the appellant. Taking all the instructions together, they lay down the law correctly.

The sale to House was only conditional. So he really never had any interest in the mules that was subject to sale.

Aldrich and *DeLong*, on the same side, contended that the sale to House was conditional, and the property never vested in him; consequently the Statute of Frauds had nothing to do with this case.

Opinion by LEWIS, C. J., full Bench concurring.

This action was brought to recover possession of two mules which were taken by the defendant upon a writ of attachment issued out of the District Court for the County of Storey, against one E. M. House, who, it is claimed by the defendant, was the owner of the mules at the time of the attachment.

The principal facts disclosed by the record are as follows:

In the month of February, A.D. 1865, the plaintiff, Carpenter, purchased the mules in question, and at the same time delivered them

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to E. M. House, either upon an absolute contract of sale, or an agreement to sell; but whether the sale was absolute or merely conditional does not satisfactorily appear from the evidence before us. The plaintiff in his testimony says: "House requested me to buy the mules for him, and said he thought he could pay me; but if he did not, he would want me to take them back." And House swears that the plaintiff bought the mules for him, and *that he was to have them if he paid for them*, and then says: "I did not pay for them, and plaintiff took them back." It appears that House drove the animals from the time they were purchased by Carpenter until about the first day of April, of the same year, at which time they were returned to the plaintiff. During the months of February and March, and for a few days after the animals were returned or resold to Carpenter, they were stabled at a public stable at the expense of Carpenter. They remained at that stable a few days after the repurchase by the plaintiff, and were then taken to his own stable, where they were continually kept when not at work. After the redelivery of the mules to the plaintiff, they were worked in a team with six other animals belonging to the plaintiff, and were occasionally driven by House, who, after the first of April, was employed by Carpenter as a driver. During the period of about eight months, from the first of April to the fifteenth of November, at which time the mules were taken by the defendant upon the attachment, House had driven them about *ninety* days. When he commenced driving for the plaintiff is not clearly shown, but it appears that it was not until some time in June, which would be two months or more after the redelivery to Carpenter. So there appears to have been a complete and perfect delivery, and a continuous change of possession of the animals, for two or three months at least, before House again took possession of them as the driver of the plaintiff.

Upon these facts it is claimed by the defendant that the sale from Carpenter to House was absolute, and that the title was transferred, and that the sale back to the plaintiff was void, because there was no immediate delivery and continued change of possession, as required by section 64 of the Act concerning Conveyances. (Laws of 1861, page 20.)

Although there is some evidence in the record tending to show that there was no absolute sale from Carpenter to House, we do not

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deem it necessary to determine upon this appeal whether it was sufficient to justify the jury in finding in favor of the plaintiff. We may say, however, if it were established that the sale was conditional upon the payment, as intimated by House in his testimony, he never became the owner of the mules, and hence no question of redelivery from him to Carpenter could arise in this case, for the plaintiff's ownership would continue until the payment was made. But as we are of the opinion that the delivery and change of possession upon the redelivery to Carpenter were sufficient to meet the requirements of the Statute of Frauds, even if House were the absolute owner at that time, it is unnecessary to determine whether the plaintiff has established the fact that the sale from him to House was conditional or not.

We find no evidence in the record before us tending to sustain appellant in his assumption that there was no immediate delivery. As the mules were kept at Hines' stable at the expense of the plaintiff, the only delivery which it would seem necessary to make would be the surrender of possession and control of the animals. This seems to have been done. House does not appear to have driven them, or to have had anything to do with them, for two or three months after they were returned to the plaintiff. It appears, also, that in a few days after the return of the mules to Carpenter, they were removed to his own stable, so that nothing was neglected which could be done to make the delivery complete. Perhaps a delay of two or three days in making delivery after the sale is otherwise complete, might not be sufficiently immediate to meet the requirements of the statute. That is a fact, however, which is to be determined by a consideration of all the circumstances of each case. In the case of *Samuels v. Gorham*, (5 Cal. 226) the Court say:

"To constitute a valid sale of personal property against creditors there must, according to the provisions of the statute of this State, be an immediate delivery thereof, accompanied with an actual and continuous change of possession. By an immediate delivery is not meant a delivery instantanè; but the character of the property sold, its situation, and all the circumstances, must be taken into consideration in determining whether there was a delivery within a reasonable time, so as to meet the requirements of the statute; and this will often be a question of fact for the jury."

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If in any other particular the sale were not complete until the animals were removed to plaintiff's stable—as if, for instance, a consideration was to be paid and no credit given, the sale would not be considered complete until the consideration was paid, and a delivery at the time of payment would be sufficient to answer the requirements of the statute. The sixty-fourth section of the Act concerning Conveyances, only requires the delivery to be made immediate upon the sale being otherwise perfected. In this case it does not appear whether the sale from House to Carpenter was considered complete or not until after the removal of the animals to the plaintiff's own stable. But, however, that would make no difference in our conclusion in this case, for we do not think it was at all necessary for Carpenter to have removed the animals from Hines' stable, where they had always been kept at his own expense, to make the delivery complete.

But it is claimed by appellant that even if the delivery were sufficient, the change of possession was not such a continuous change as is required by the statute. We do not think this language of the Act should be construed to mean a change of possession for an indefinite period of time. Like all statutes, it must be interpreted by the light of the reason or necessity which induced its adoption. The evident object of the Legislature was to require such change of possession as will amount to a general advertisement of the status of the property and the claim to it by the vendee, and to declare such sales void where the delivery is not *bona fide*, but merely formal, taken by the vendee to be surrendered back again. There certainly must be some period when possession of that property by the vendor would not relate back and vitiate the sale made by him. To hold that the change of possession must continue indefinitely, would produce results so unjust and absurd that it can hardly be believed the framers of the statute had any such purpose in view. In the case of *Stevens v. Irwin*, (15 Cal. 503) the Supreme Court of California, in discussing this question, say :

“But it never was the design of the statute to give such extension of meaning to this phrase, ‘continued change of possession,’ as to require, upon penalty of forfeiture of the goods, that the vendor should never have any control over them, or use of them. This construction, if made without exception, would lead to very unjust and

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very absurd results. A vendor could never become trustee of the goods without their being forfeited, or liable for his debts. * * * The continued change of possession, then, does not mean a continuance for all time of his possession, or a perpetual exclusion of all use or control of the property by the original vendor. A reasonable construction must be given to this language, in analogy to the doctrine of the Courts holding the general principles transcribed into the statute. * * * This possession must be continuous—not taken to be surrendered back again—not formal, but substantial. But it need not necessarily continue indefinitely, when it is *bona fide* and openly taken, and is kept for such a length of time as to give general advertisement of the status of the property and the claim to it by the vendee.”

It seems to us that the reasonable construction to be placed upon the statute is, that the change of possession must be actual, *bona fide*, and must continue for such a length of time as will, under the circumstances of each case, be likely to operate as a general advertisement of the sale or change of title of the property. In this case there can be little doubt but that under these general rules the delivery from House to Carpenter was sufficient to meet the requirements of the statute. The mules were always kept at the public stable at the expense of the plaintiff; upon the sale to him, on the first of April, he took possession and assumed complete control of them; placed them in a team with six other animals of his own; in a few days thereafter removed them to his own stable; does not seem to have employed House to drive them for two or three months afterward; and when he did drive them, it was in connection with other animals belonging to the plaintiff, and under circumstances which would clearly show to the public the change of property from House to Carpenter; and it is shown by several witnesses that they were generally supposed to be the property of the plaintiff. Hence, we conclude that the delivery was in all respects sufficient to transfer the title to the plaintiff as against the creditors of House.

As the general views expressed in this opinion cover the questions made upon the instructions, we deem it unnecessary to give them any special consideration.

The judgment of the Court below is affirmed, and it is so ordered.

Carson River Lumbering Co. v. Bassett *et al.*

CARSON RIVER LUMBERING CO., RESPONDENT; v. A. BASSETT ET AL., APPELLANTS.

2	249
3	198
19	400
14	500

The general rule of law is, that that which is in its inception a tort cannot be waived so as to support an action of assumpsit.

To enable a party to recover in assumpsit on implied promise, the plaintiff must establish such facts that a promise on the part of the defendant might reasonably be presumed from the transaction. No such promise can be presumed when the defendant commits a trespass under a claim of right.

There are some cases in which the plaintiff may waive the trespass, and sue in assumpsit. One, when the trespasser sells the personal property of plaintiff and receives the money. Another, when the trespasser dies, and suit is brought against his personal representative.

Although all forms of pleading are abolished, yet a party must prove the case he makes in his pleadings, or fail. A party who alleges a contract, and seeks to recover under that contract, cannot recover on proof of a trespass.

The fact that there was evidence tending to sustain the complaint of plaintiff, will not sustain the judgment under the instructions in this case, which assumed that plaintiff might recover on proving that which would amount to a trespass, whilst the action was exclusively on contract.

The Act of the Territorial Legislature granting exclusive privileges to plaintiff's assignors was a valid constitutional Act. The grantees under that Act complied with the conditions precedent.

APPEAL from a judgment of the District Court of the First Judicial District, Storey County, Hon. RICHARD RISING presiding.

The facts are stated in the Opinion.

J. Cradlebaugh and *B. C. Whitman*, for Appellants.

Cradlebaugh urged the point, that the Territorial Legislature had no authority to grant the exclusive use of the Carson River to the assignors of the plaintiff.

Whitman argued that a corporation can only exercise such powers as are expressly conferred. Here there was no power to collect tolls. The powers of corporations are to be construed strictly.

A franchise is not the subject of sale.

The facts as proved in this case will not support assumpsit. (*Mayor of Northampton v. Ward*, 1 Wils. 109; *Saunders' Pleading*, vol. 1, p. 111; *Birch v. Wright*, 1 Term. R. 378-387.)

The same rule in this respect holds good under the code as at

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common law. (*Miller v. Van Tassel*, 24 Cal. 463; *Lubert v. Chauviteau*, 3 Cal. 462.)

As to implied promise, see *Cripps v. Blank*, 9 Dowling & Ryland, 480.

Rhodes & Kirkpatrick, for Respondents.

There were two counts: one, an express contract; the other, an implied assumpsit. If the proof supports either, the verdict must stand.

The owner of a franchise may waive the tort, and sue in assumpsit in a case of this kind. (*Mayor of Newport v. Saunders*, 3 Barn. and Adol. 411.) This case overrules the case of *Mayor of Northampton v. Ward*.

Opinion by LEWIS, C. J., BEATTY, J., concurring.

On the twenty-eighth day of November, A.D. 1861, the Legislature of the Territory of Nevada passed an Act entitled "An Act for the improvement of the east branch of Carson River," by which C. H. Hobbs, J. C. Russell, David Smith, and J. L. Rennall were authorized and empowered so to improve the east branch of the Carson River from where it crosses the boundary line between California and Nevada Territory to the junction of the same with its west branch, and thence the main channel to the town of Empire City in Ormsby County, by removing logs, rocks, opening sloughs, and cleaning out other natural obstructions from it so as to make it suitable for the purpose of rafting down logs and timber to the town of Empire City. The second section of the act declares that "the said C. H. Hobbs, J. C. Russell, David Smith, and J. L. Rennell, or their assigns, on compliance with the provisions of the first section of this act, shall have the exclusive right to the use of said river, within the points named in said first section, for the purpose of floating down logs and timber of all kinds for the period of five years, commencing on the first day of March, A.D. 1862; at the expiration of which time said river, together with all improvements made for the navigation thereof, shall be free for and open to the people of Nevada Territory." The sixth section makes it the duty of the franchisees to construct such chutes and aprons over all dams which were erected at the time of the passage of the act

as would entirely secure them from injury, and also to construct proper booms at or near Empire City across the river, to prevent any logs or timber from floating down the stream below that point. A. W. Pray, James Wheeler, and John H. Atchison were by the seventh section appointed a Board of Commissioners to examine the chutes, booms, and aprons constructed by the franchisees, and when the Board, or any two of them, should certify "the river to be safe to float and raft logs and timber, without damage to the dams below thereon," it should be lawful for the parties named to use the stream as in the act provided; *provided*, it should not be lawful for said parties to exercise any of the rights or franchise granted by the act until they obtained the certificate from the Board of Commissioners.

In the month of May, 1863, two of the Commissioners, A. W. Pray and John H. Atchison, made the following report, in accordance with the requirements of the Legislature: "We, the undersigned, appointed a Board of Commissioners by Section seven of an act entitled 'An Act for the improvement of the east branch of Carson River,' approved November 28th, 1861, respectfully report that we have examined the chutes, booms, and aprons in said river, in pursuance of the duties prescribed and imposed upon us by said act, and we do hereby certify and declare said chutes, booms, and aprons in said river to be safe to float and raft logs and timbers without damage to the dams below thereon, unless the said river should rise to an extraordinary height and overflow its banks."

On the twenty-fourth of February, A.D. 1863, the franchisees formed a corporation, and adopted the name "Carson River Lumbering Company."

After the plaintiff had improved the river by the construction of chutes, aprons, and booms, and the removal of obstructions from the channel, the defendants who had organized an association styled the "Carson River Wood Company," placed in and floated down the stream, at different times, about eight thousand nine hundred cords of wood, and used the plaintiff's improvements, as it is claimed, in so doing. Upon these facts, the plaintiff brings an action of assumpsit to recover the sum of eight thousand nine hundred dollars, which, he alleges, is a reasonable compensation for the use of the river and the improvements placed thereon by it, and that the

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defendants promised and undertook to pay that sum to it. The defendants, in their answer, deny all the material allegations of the complaint. Upon the trial, it was proven that the defendants did use the river as alleged by the plaintiff; but whether the defendants ever promised to pay for the privilege of doing so, or not, is a question not by any means settled by the testimony.

The weight of evidence is decidedly against the plaintiff upon that point.

That is, however, a question not necessary to be determined on this appeal, as the judgment must be reversed upon an error committed by the Court in refusing to give certain instructions asked by the defendants, and in giving others at the request of plaintiff. Counsel for plaintiff and the Court below seem to have acted upon the assumption that it was unnecessary for plaintiff to establish a promise or undertaking by the defendant, but that the law would raise an implied promise from the use of the river and improvements by the defendants. The jury were therefore instructed that "if they believed that no special agreement existed between the plaintiff and defendant to pay the plaintiff for the use of the franchise and improvements, but believed that the defendants made use of the same in the years 1864 or 1865, or both, then they should find for the plaintiff in such sum for each year as, in their estimation from the evidence before them, would be a fair compensation for the use thereof;" and the Court refused to give the following instructions asked by the defendants: "No right to charge for the use of the river or improvements is expressly granted by the Acts of the Legislature put in evidence by the plaintiff; no such right can be implied, and no implied contract can be raised from such use; therefore, in this form of action, the plaintiff cannot recover."

We are clearly of opinion that the Judge below erred in charging the jury as stated above, and in refusing to give the foregoing instruction at the request of the defendants. It is quite evident that if the defendants used the river and plaintiff's improvements without its permission or assent, it committed a trespass; and if the plaintiff cannot waive such trespass, and sustain an action of assumpsit for the use of the river and improvements, it cannot recover in this form of action. It is assumed, in the instruction given

by the Court to the jury on behalf of plaintiff, that the law would raise an implied promise from the use of the river and the plaintiff's improvements.

The old rule was, that what was a tort in its inception could not by any subsequent transaction be made the foundation of an implied assumpsit. And though this rule has in some peculiar classes of cases been relaxed, it is still the general rule. In most actions of trespass nothing could be more repugnant to the real facts than an implication of a promise on the part of the tortfeasor; and it would often be in direct conflict with his express declarations. None will claim that the law would raise an implied promise to pay rent by one who takes possession of and holds lands or tenements by force and under a claim of right in himself, nor that the law will raise an implied promise to pay a certain sum of money as damages for an assault and battery. To justify a recovery upon an implied assumpsit, it is necessary for the plaintiff to establish facts from which a promise upon the part of the defendant to pay a certain sum of money can reasonably be presumed. But no such promise can possibly be presumed where the act constituting the cause of action is done in defiance of plaintiff's rights, or under a claim of adverse right.

This question has, however, been fully settled by the Courts, and is no longer *res integra*. It has been frequently held that an action of assumpsit founded upon a tort, can only be maintained in cases where personal property is unlawfully taken and sold by the tortfeasor. In such case the owner of the property may waive the tort, affirm the sale, and have an action for money had and received for the proceeds. There is also another class of cases where assumpsit will lie to recover damages growing out of a tort, and that is where the action is brought against the executor or administrator of the wrongdoer. The Courts have allowed assumpsit in this latter class of cases simply because trespass will not lie, the tort being extinguished with the death of the wrongdoer. If assumpsit were not maintainable, there would be a failure of justice. These two classes of cases are, however, the only exceptions which we have been able to find to the general rule. In the case of *Jones v. Hoar*, 5 Pickering, 285, the Court say: "The plaintiff declares in assumpsit, and one count is for goods sold and delivered.

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By the agreement it appears that the only ground for supporting this count is that the defendant cut and took away certain trees from land claimed by the plaintiff, and for the purpose of the argument, actually owned by him. The proper action would undoubtedly be trespass for the injury to the land, or trover for the trees. But the plaintiff contends that he has a right to waive the tort, and charge the defendant with the trees as sold to him. Upon examination of the authorities cited, which are well summed up and commented upon by Strong, J., in the opinion of the Court of Common Pleas, we are satisfied that the plaintiff cannot maintain this position. There is no contract, express or implied, between the parties, and therefore an action *ex contractu* will not lie. The whole extent of the doctrine, as gathered from the books, seems to be that one whose goods have been taken from him or detained unlawfully, whereby he has a right to an action of trespass or trover, may, if the wrongdoer *sell the goods and receive the money*, waive the tort, affirm the sale, and have an action for money had and received for the proceeds. No case can be shown where assumpsit, as for goods sold, lay in such case, except it be against the executor of the wrongdoer, the tort being extinguished by the death; and no other remedy but assumpsit against the executor remaining." So in the case of *Bennett v. Francis*, (2 Basanquet & Puller, 550) Lord Alvanly, C. J., after saying that he did not intend to give a positive opinion upon the question, used the following emphatic language:

"But thus far, I will say, that it does appear to me monstrous to carry the causes to any such extent as that which has been contended for, and that they do not warrant the conclusion which has been drawn from them. * * * I do not find that the Judges in any of the cases have gone so far as to hold that a tort may be converted into a contract. * * * All that is to be collected from the cases is this, that if the goods be converted into money, the Court will allow the plaintiff to waive the tort, and bring an action in which he can recover nothing more than the sum actually received."

These authorities are directly opposed to the instructions given to the jury at the request of the plaintiff, for if the tort cannot be waived and assumpsit maintained, there is no implied promise

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arising out of the wrong. We can see very readily how tolls might be recovered from a trespasser in an action of assumpsit. The law gives the right to collect them, and if the plaintiff shows that right, and that defendant had become liable to pay such toll by doing the act for which toll is authorized to be collected, the law would at once raise an implied contract or promise to pay the customary toll, and the defendant would *not* be allowed to plead his own trespass to avoid the recovery. Upon the same principle, perhaps, stallage might be recovered. In these cases the trespass would not appear at all. But in a case like this, to show that defendants made use of the river and plaintiff's improvements without the permission of the plaintiff, is showing a trespass out of which no implied promise could well arise. But, say counsel for plaintiff, all forms of action are abolished by our statute, and as there is in this case a clear right, the Court should not refuse a remedy. To this it is simply necessary to say, that it does not necessarily follow that because the plaintiff has a right, the Courts should always give a remedy, whether he uses the proper means of obtaining it or not. To entitle him to recover it is necessary, not only that there be a good cause of action, but the plaintiff must seek his remedy before the proper tribunal and under proper pleadings. It will hardly be claimed that because the forms of action have been abolished, a party must have his relief whenever he asks it, whether his pleadings be in accordance with the facts out of which the action arises or not. Counsel would hardly expect to recover on a promissory note in an action in which the complainant charges a trespass upon land or *de bonis asportatis*, nor to recover damages against a defendant for trespass in an action in which he is sued for rent upon a lease. If in such a case there is a failure to show a lease, there could be no recovery in that action, because there would be a failure to establish the fact upon which the action is founded. As in this case the plaintiff declares upon a contract, if he fails to establish it there must be an end of the action. If under such a complaint he can recover damages in trespass for infringing the plaintiff's franchise, there can be no good reason why he should not also be permitted to recover upon a promissory note under the same pleading.

We do not think such indulgence can possibly be extended to litigants under any system of practice.

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The fact that there was evidence introduced tending to sustain all the counts in the complaint, and the jury having found a general verdict, do not, it seems to us, help the plaintiff's case upon this appeal. The Court in effect charged the jury that the use of the river and improvements would raise an implied promise to pay what such use was reasonably worth. This was not correct, and the presumption is that it misled the jury, and is therefore sufficient to reverse the judgment.

Though we consider it entirely unnecessary to discuss at length the question of the validity of the Act of the Legislature granting the franchise to the plaintiff, and the question of whether the condition upon which it was granted was complied with, yet it may be well to say in brief, that we are clearly of opinion that the legislative Act is valid, and that the condition was fully performed.

The judgment below must be reversed, and it is so ordered.

RESPONSE TO PETITION FOR RE-HEARING.

Opinion by LEWIS, C. J., BEATTY, J., concurring.

Every point made in the petition for re-hearing in this case was thoroughly considered in our first opinion, and no authorities are cited which in any way conflict with the conclusions of the Court in that opinion; and as we are fully satisfied that the law is correctly enunciated therein, we do not feel disposed to grant a re-hearing of the argument. The general rule of law unquestionably is, that what is once a tort cannot by any subsequent transaction be made the foundation of an implied assumpsit. There are exceptions to this rule, some of which we referred to in the original opinion, but this case does not come within any of the exceptions.

There is no doubt but the plaintiff has a right to a retrial of the issue upon the pleadings as they stand. The judgment was reversed upon an erroneous instruction given by the Court below, and we can see no reason why plaintiff should not go to trial on its present complaint, if counsel are satisfied that a contract or promise on the part of the defendants can be proven. The former judgment of this Court must stand, and a new trial is awarded.

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- When an association of individuals formed to carry on a certain business, contracts debts, and afterwards the association is converted into a corporation, the same individuals who formed the joint stock association becoming corporators to continue the same business, the corporation may be liable for the debts of the association.
- But when a corporation is formed, the capital or incorporate property of which is composed partly of the property of a pre-existing association and partly of property contributed by corporators who had no connection with the previous association, the corporation is not bound for the debts of the late association.
- The stock of the former associates would be liable for the debts of that association. But the creditors of that association would have no claim on the corporate property, or the stock of those corporators who were not connected with the original association.
- When there is an agreement between all the parties about to incorporate, that the corporation shall assume all the debts of the prior association; or when, after incorporation, the corporate body assumes all the debts of the old association, undoubtedly this would enable the creditors to maintain assumpsit against the corporation.

APPEAL from the District Court of the First Judicial District, Storey County, HON. RICHARD RISING presiding.

The facts are stated in the Opinion.

Williams & Bixler, for Appellants.

When the mining association of Fairfax, Doake & Co. became incorporated for the purpose of more effectually carrying out and executing the original purpose of the association, and the corporation accepted a transfer of all the property of the association, it became liable, primarily, for all its debts. (Angell & Ames on Corporations, Secs. 169 and 592, and the following authorities cited in note 5 to Sec. 169: *Haslett v. Witherspoon*, 2 Strob. Eq. R. 209; *Wesley Church v. Moore*, 10 Barr. 273; *Attorney Gen. v. Corporation of Leicester*, 9 Beav. 546.)

Here was an account stated. The account having been furnished to defendant and retained by it, neither returned nor objected to, it became an account stated and binding on defendant. (13 Cal. 427; 2 Green. on Ev., Secs. 126 and 127; Saund. Pl. & Ev. 43; *Cris-*

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man & another v. Count & Hawley, 2 Manning & Granger, 307, 40 Eng. C. Law, 615.)

L. Aldrich & C. J. Hillyer, for Respondents.

Fairfax, Doake & others were tenants in common, but not partners, as shown by the testimony. As tenants in common, one could not bind his co-tenants. (*Wiseman v. McNulty et al.*, 25 Cal. 230; *Holland v. Craft, admr. etc.*, 3 Gray, 162; *Leffingwell et al. v. Elliott*, 8 Pick. 455.)

It does not appear that the corporation is the successor to Fairfax, Doake & Co. It does not appear that the corporation has all the property formerly held by Fairfax, Doake & Co. There is no evidence that they have not other property to pay their debts. All the tenants in common (or partners, if they can be so held) of Fairfax and Doake did not convey their interest to the corporation. Some part of the mine was conveyed to the corporation by parties who were not owners when this debt was contracted, and were not liable for it.

The transaction between the corporation and the owners of the mine was simply a sale and purchase. The corporation had a right to purchase free from all liens except those of record.

If there is any liability, it is in equity. That remedy has not been pursued. It could not be liable beyond the property received from Fairfax, Doake & Co.

There was no assumption of the debt by the corporation, for all negotiation on this score was with former members of the Fairfax-Doake concern, and they were negotiating in their individual capacity, and not as officers of the corporation.

There was no account stated with the corporation. There never were any mutual dealings between the plaintiff and corporation to be stated.

Opinion by LEWIS, C. J., BEATTY, J., concurring.

Fairfax, Doake & Co., whilst proprietors of the Bacon mining ground, contracted the indebtedness upon which this action is founded, by over-drafts on the bank of the plaintiffs; the money thus obtained being used in the development and working of the

mine. After this debt was contracted, Fairfax, Doake, and their copartners associated themselves with the proprietors of a certain quartz mill, and incorporated the property of both associations under the name of the Bacon Mill and Mining Company. By this arrangement the proprietors of the mill received an interest in the corporation equal to one-fourth of its capital stock, and the owners of the mine received the remaining three-fourths. Some time after the incorporation was perfected the plaintiffs presented their account against Fairfax, Doake & Co., to the Secretary and some of the Trustees of the corporation for settlement; but though there was some talk or negotiating between two or three of the Trustees and the plaintiffs with respect to the demand, there seems to have been no assumption of it by the defendant, nor any promise to pay it. The only persons who in any way seemed to acknowledge the plaintiffs' claim were the members of the firm of Fairfax, Doake & Co., and the testimony of those persons clearly shows that they never intended to acknowledge it as a liability of the defendant, but only that they would endeavor to get the corporation to assume it and to make some arrangements for its payment. Mr. Fairfax, one of the firm of Fairfax, Doake & Co., with whom the plaintiffs had interviews about the payment of their demand after the incorporation, in speaking of the conversation between himself and the plaintiffs upon that subject, says: "I did not represent the defendant at any of these interviews or conversations, nor was I authorized to do so." And again he says: "All I have to say here is, that as owner in the ground I was always ready to make any fair adjustment of any claim of indebtedness contracted by Mr. Doake, but that as trustee of this company I have never undertaken or attempted to adjust this claim."

Mr. Pringle, who was also a member of the copartnership of Fairfax, Doake & Co., says with respect to the conversations which he had with the plaintiffs: "I did not act or propose to act as a trustee, because there was no meeting of the Board of Trustees."

The Board of Trustees never seem to have in any way acted upon the matter, nor is it shown that there was any agreement between the proprietors of the mine and mill, at the time of incorporation, that the corporation should assume the liabilities or be responsible for the debts of Fairfax, Doake & Co. It is, how-

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ever, claimed by counsel for appellant that such understanding or agreement was entirely unnecessary; that the liability of the defendant for those debts arises from the fact that it is the successor of the association which contracted the debt, and has received a transfer of all its property for the purpose of carrying out the object of the association of Fairfax, Doake & Co., and some authorities are cited to sustain this position, none of which, however, in our opinion, in the remotest manner support it.

Had the mill-owners all been members of the firm of Fairfax, Doake & Co. at the time the debt sued on was contracted, and had they formed a corporation for the purpose of carrying out the objects of the partnership or association, without taking in strangers, in such case the corporation would perhaps, be primarily liable in equity for the debts of the association which it succeeded. Under such circumstances the property of no one but those who contracted the debt and were originally liable would be taken or subjected to the payment of it. The same persons continue the same business, with the same property, with no substantial change except in name. In such a case there is no reason why in equity the corporation should not be primarily liable for the debts, as it has succeeded to the property of the association. But if the rule contended for by counsel for appellant be the law, the property of a stranger to the contract of indebtedness, who may have had no knowledge of its existence, or even the means of ascertaining it, would be subjected to the payment of the liabilities of individuals with whom he may have associated himself in a common enterprise or business. The injustice of such a rule is so apparent that no subtlety of reason can well disguise it. The general rule of law is that none are liable upon contract except those who are parties to it, but here it is sought to charge an entire stranger to the contract with the responsibility of discharging it. The plaintiffs had no lien upon the mine, the formation of the corporation deprived them of no remedy or security; the interest which the mill-owners received in the corporation was doubtless only equal to the value of the property which they put into it; the plaintiffs' right of action against Fairfax, Doake & Co. continued as if no incorporation had taken place, and their interest in the Bacon Mill & Mining Company was as much subject to be taken to satisfy the demand of plaintiffs as the mining ground was before the

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incorporation ; hence, we see no equity to favor the rule contended for by appellants' counsel. The case of an incoming partner is analogous to this, and it is universally held that he is not chargeable with the liabilities of the firm contracted before he became a member. If, instead of incorporating, the proprietors of the mill and Bacon mining ground had formed a partnership, the authorities are uniform that, without a promise by the new firm, the mill proprietors would not be holden for the debts of the old firm. (Story on Partnership, pp. 152 and 153.)

Why, then, should they be any more liable when, instead of a partnership, they form a corporation ? There would seem to be no better reason for subjecting the interest of corporations to the payment of the debts of their associates contracted before the formation of the corporation than for holding A liable for the payment of the debts of B, where there is no ground for doing so except the purchase by A of the property of B.

If it be the law that a corporation is liable for the debts of some of its members contracted in the furtherance of the common object before they associate themselves with others in the corporation, why is it not also liable for the individual liabilities of each of its members contracted in the same pursuit ? We apprehend it would be rather difficult to establish any substantial reason why the rule in the one case should not prevail in the other. The rule laid down in *Angell & Ames on Corporations*, p. 169, that "if an association becomes incorporated, and the corporation accepts a transfer of all the property of the association for the purpose of carrying out the object of the association, the corporation will become primarily liable in equity for the debts of the association," certainly does not apply to cases where strangers to the association unite with it in the incorporation. The members of the original association, of course, continue liable, as if no incorporation had taken place, and their interest in the corporation may be sold on execution ; but that the interest of a stranger to such indebtedness can be taken to satisfy it, is a doctrine which we can never sanction as law. Unquestionably if, when the mill proprietors and mining company were incorporated, there were any understanding or agreement between the respective parties that the corporation should be liable for the debts of the co-partnership or association, this action could be maintained, because

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that would be a sufficient assumption of the debt to make it its own. Or, if after the incorporation was complete, the corporation assumed or promised upon sufficient consideration, to pay the creditors of any of its members, in such case also the action could be maintained. But when such promise is relied on it must be clearly proven, for the presumption is against it. We conclude, therefore, that before the defendant can be held liable for the debts of Fairfax, Doake & Co., it will be absolutely necessary for the plaintiffs to show that such was the understanding between the parties at the time of incorporation, or to show such a promise as will be sufficient to bind it upon contract. Here no such promise is shown. The conversations and promises of Pringle and Fairfax were not sufficient to charge the corporation with their liabilities.

The judgment of the Court below must therefore be affirmed.

SAMUEL READ, APPELLANT, *v.* DANIEL EDWARDS ET AL., RESPONDENTS.

A and B negotiate a loan in the State of California. A receives the money, and executes, on his part, a joint note, and also a mortgage on property situate in this State, as security for the money. This note and mortgage are then sent to Humboldt County, Nevada, where they are also executed by B, and the mortgage placed on record. *Held*, that the note and mortgage were consummated in this State, and are not barred by the Six Months' Statute of Limitations, which applies to notes, etc., executed out of this State. Even if the note was barred, the mortgagee might foreclose the mortgage, and subject the mortgaged property.

APPEAL from the District Court of the Sixth Judicial District, Humboldt County, Hon. E. F. DUNN presiding.

The facts are stated in the Opinion.

McRae & Rhodes, for Appellant.

The mortgage being executed by one party in California, and at a subsequent time by the other party in this State, did not become an executed instrument until the latter party executed it.

Even if the mortgage must be treated as executed by Evans in

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California, still Edwards executed it in Nevada, and his interest in the property was certainly bound.

The Statute of Limitations does not apply to mortgages which are not obligations or contracts for the payment of money. (See *Henry v. Confidence Company*, 1 Nevada, p. 619.)

R. M. Clarke, for Respondents.

There being no appeal from the order denying a new trial, and no statement on appeal, this Court can only look into the judgment roll; that being regular, the judgment must be affirmed.

McRae & Rhodes, in reply.

The pleadings contained in the judgment roll show that the judgment should be reversed. There should, even on the facts as admitted in the answer, have been a foreclosure and sale of the mortgaged property, under the rule laid down by this Court in the case of *Henry v. Confidence Company*.

But the Statute requires the written opinion of the Court to come up with the judgment roll on appeal. The finding of facts is, in effect, a written opinion which this Court will look into, to see if the Court below has erred.

The Supreme Court of California, in the case of *Redman v. Yontz*, 5 Cal. 148, decided to look into a bill of exceptions, although there was no statement, and, technically, it is no part of the judgment roll.

That Court has also held frequently that when a cause is tried by the Court without a jury, the record must disclose a finding of facts, or the judgment will not be sustained. (See 2d Cal. 474 and 305; also, 3d Cal. 111 and 467.)

Opinion by LEWIS, C. J., BEATTY, J., concurring.

This action was brought to foreclose a mortgage executed by the defendants to secure the payment of a promissory note, bearing date at Marysville, in the State of California, March 16, A.D. 1863, and made payable one year from the date thereof. The only defense pleaded by the defendants is the Statute of Limitations, and to support it the following facts are set up: that the money for which

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the note and mortgage sued on were given was advanced to the defendant Evans, at Marysville; and that, so far as he was concerned, the instruments were executed there and delivered to the plaintiff, to be sent to the county of Humboldt, in the Territory of Nevada, for execution by the defendant Edwards; that they were so sent to him, and were executed in accordance with the understanding between Evans and the plaintiff.

The allegation of these facts is made in the answer in the following manner: "Said defendant Evans, then and there, at said city of Marysville, signed said note sued on, and executed and acknowledged said mortgage, and then and there delivered said note and mortgage to plaintiff; and that the signing and execution of said note and mortgage by defendant Edwards was afterwards done by him in the county of Humboldt, and was only the consummation (in part) of the said contract of loan which had been previously entered into by said defendant Evans, for himself and defendant Edwards, in said city of Marysville, in the State of California."

Upon these facts it is claimed that the action is barred by that Act of the Territorial Legislature, approved December 19th, A.D. 1862, which declares that "an action upon any judgment, contract, obligation, or liability, for the payment of money or damages, obtained, executed, or made out of this Territory, can only be commenced within six months from the time the cause of action shall accrue." If the note sued on in this case be a contract, or obligation obtained or executed out of the State or Territory of Nevada, there can be no doubt that, so far as the note is concerned, the defendants' plea is good. But, in our opinion, it does not come within the Statute referred to. The action is not *assumpsit* for money loaned in the State of California, but a suit in equity upon instruments, the execution of which was completed in the Territory of Nevada. The execution of the note and mortgage was not perfected until signed by all the parties to them. Until the execution is perfected, the instrument is *inchoate* and imperfect. The plea of the Statute of Limitations is never looked upon with favor by the Courts, hence a party relying upon it must clearly make out his defense. In this case, the defendants allege in their answer that the signing by Edwards at Humboldt was the consummation of the transaction, left *inchoate* by Evans; and, in our opinion, it is necessary for the

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party seeking to avail himself of this Statute, to show that the final act by which the execution of the instrument becomes complete, is done out of the State, a partial execution without, when the final and finishing act is done within the State, will not be sufficient. True, so far as Evans was concerned, the execution was complete in the State of California, but in no sense of the word can it be said that the *instruments* were executed before all the parties had signed them. But even if the Statute was a complete defense to the note, the Court below, under the ruling of this Court in the case of *Henry v. The Confidence Co.*, 1 Nevada, 619, should have permitted a foreclosure of the mortgage.

We agree with counsel for respondent that when an appeal is taken merely from the judgment, the Appellate Court cannot review errors which do not appear on the judgment roll, and in this case we have not done so. The defense disclosed by the answer being insufficient, even if established by proof, we have not deemed it necessary to look beyond the judgment roll. The Court below erred in dismissing the bill, and its judgment must be reversed.

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APPELLANT.

This Court cannot reverse a judgment for want of sufficient evidence to sustain the verdict, unless the record shows that all the material evidence is before us.

When a party draws a pistol with the avowed intention of killing another, third parties interfere to prevent the threat being carried out; the pistol goes off, and the party threatened is killed; the natural presumption would be that the defendant had succeeded in carrying out his intention, notwithstanding the interference. If the defendant claims that the pistol went off accidentally in the scuffle with the bystanders who interfered to prevent the shooting, it lies on him to present some proof of that fact.

Evidence of threats made by defendant may be proved not only to establish the killing, but when the killing is admitted, for the purpose of establishing motive or deliberation.

When a threat is made against a party, unless he will do something which he fails to do, and the threat is afterwards executed, it would seem to be as conclusive as if it had not been connected with a condition.

If the threat was made only conditionally, and the party threatened afterwards complied with the condition, this would, to a great extent, rebut the presumption arising from the threat.

APPEAL from the District Court of the Seventh Judicial District, Lander County, Hon. W. H. BEATTY presiding.

The sixth instruction asked by the defendant was in these words: "A threat coupled with a condition is never regarded in law as of binding force, unless the condition be of such a character as that the party threatened cannot comply with the condition: *e. g.*, if a party be threatened by another that unless he leave a certain place or house, or unless he stop coming to the party threatening's house, he will shoot him; here the party threatened may leave the place, or stop calling at the house of the party threatening, and no harm will result. A party making such threats could not be bound over to keep the peace. So in the present case. If the threat or threats were made conditionally, they are not of such binding force as if they had been made unconditionally."

The other facts appear in the Opinion.

Harry I. Thornton, for Appellant.

The verdict is contrary to the evidence. The killing was, at most, only involuntary manslaughter.

The Court below erred in refusing to give instruction Six, asked by the defendant.

Geo. A. Nourse, Attorney General, for Respondent.

The threat made by defendant was evidence of express malice. But if there had been no threat, the total absence of provocation shows implied malice.

The instruction No. Six, asked by defendant, was properly refused, because it does not contain the law.

Opinion by LEWIS, C. J., BEATTY, J., concurring.

The judgment in this case must be affirmed. As it is not shown that the statement contains *all* the evidence produced at the trial, we cannot say that the verdict was not justified by the proof. Unless all the material evidence introduced at the trial be brought before us, we cannot, of course, pass upon its sufficiency. To justify

an Appellate Court in setting aside a verdict upon the ground of insufficiency of the evidence, the record which is presented to it must purport to embody all the material evidence adduced at the trial.

But it is unnecessary to rely upon that point, for we consider the evidence presented to us fully sufficient to support the verdict of the jury. The principal facts, about which there is no dispute, make a strong case against the defendant. He is shown to have entered the saloon where the deceased was killed, demanded some money which he claimed the deceased had belonging to him, and threatened to shoot him if he did not comply with his request, and, at the same time, drawing a pistol, as if to execute his threat. Two persons who were present interfered to prevent violence, and, in the struggle between them and the defendant, the pistol was discharged whilst in the hands of the defendant, and the shot took effect in the breast of deceased, inflicting the mortal wound from which he soon afterwards died. These facts were sufficient to justify the conviction. If the pistol was accidentally discharged, that was a matter of defense which devolved upon defendants to establish. From the testimony, as it is presented to us, we have no reason to presume that such was the case. The defendant threatened to shoot the deceased if he did not return some money which defendant claimed, drew his weapon to execute his threat; the money was not returned. Third persons interfered, a scuffle ensued, and the deceased was shot. It is possible the pistol was discharged accidentally, but that does not seem to have been established to the satisfaction of the jury; and in the absence of proof to that effect, the most natural conclusion is, that the defendant, even in the struggle with Cohn, succeeded in carrying out his purpose and executing his threat. Through the entire struggle he was probably exerting himself to bring his weapon to bear upon the deceased, and, when he succeeded in doing so, fired. This is certainly the only rational conclusion we can arrive at from the evidence before us, and the jury undoubtedly arrived at the same conclusion. The guilt of the defendant was proven to the satisfaction of the jury, and the record does not warrant this Court in holding that they should have found a different verdict. Hence we could not feel justified in setting aside the judgment and awarding a new trial.

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The sixth instruction asked by the defendant was properly refused. Evidence of threats employed by the defendant against a person whom he has killed, is admissible not only for the purpose of raising a presumption that the killing was done by him in cases where that fact is not clearly established by other proof, but also for the purpose of showing the deliberation or premeditation. In this case all the circumstances of the killing were detailed by eye witnesses; hence the proof of the threat to kill was only for the purpose of establishing the intent to take life—the motive aforethought. Now, when a threat is coupled with a condition and the condition is not complied with, as was the case here, and the threat is afterwards executed, proof of it would be as conclusive of the defendant's premeditated violence as if there had been no condition.

If the condition had been complied with and there was a doubt as to whether the defendant did the killing, and the threat was proven, with other circumstances to establish that fact, the condition and compliance with it might be of some weight in favor of the defendant. But in a case of this kind, the condition would seem to be of no consequence.

The judgment of the Court below must be affirmed, and it is so ordered.

STATE OF NEVADA, APPELLANT, v. H. W. SALES,
RESPONDENT.

There is no such crime known to the law as an *attempt* to commit embracery.

Embracery is itself but an attempt to do a wrong. There can be no indictment for an *attempt to attempt*.

To attempt to commit a crime is itself a crime at Common Law; but this cannot apply to the crime of embracery.

It is also a crime at Common Law to solicit another to commit either a felony or misdemeanor; and whatever is a crime at Common Law is punishable under our statute. It is a crime to solicit another to commit embracery. It is a crime in A to solicit B to attempt to corrupt a juror.

APPEAL from a decision of the District Court of the Seventh Judicial District, Hon. W. H. BEATTY presiding.

The facts are stated in the Opinion.

H. Mayenbaum, for the Defendant.

The defendant was not guilty of embracery. He did not attempt to corruptly influence a jury.

He was not guilty of any attempt to commit a crime known to the law. He only proposed to another to commit an offense against law. A mere proposal to commit an offense does not amount to an attempt. (*March & Guivits v. The People*, 7 Barb. p. 391; *Bouvier's Law Dic.*, "Attempt"; *People v. Murray*, 14 Cal. p. 160.)

B. P. Rankin, District Attorney of Lander County, for the State.

Opinion by LEWIS, C. J., full Bench concurring.

The indictment in this action charges the defendant with "the crime of an attempt to commit the crime of embracery." The facts set out in the bill to support this charge are substantially as follows:

The defendant, whilst acting as a juror in a certain civil action pending in the District Court for the County of Lander, approached one of the attorneys in the cause and offered to secure and return a verdict for the defendant for the sum of one hundred dollars. There is no charge that he was corruptly influenced, or that he attempted in any way corruptly to influence his fellows. The substance of the indictment is an offer to secure a verdict for the defendant in the action for a sum of money. To this indictment the defendant put in a general demurrer, which was sustained, and the case was re-submitted to the Grand Jury. The only question presented to this Court for determination is whether the facts detailed in the indictment constitute an indictable offense. Whilst we are inclined to the belief that the defendant might be held under a proper indictment, we do not think the bill presented to us in this record charges the defendant with any crime known to the law. Embracery is defined to be an attempt by either party, or a stranger, to corrupt or influence a jury, or to incline them to favor one side by gifts or promises, threats, or persuasions, or by instructing them in the cause, or any other way, except by opening and enforcing the evidence by counsel at the trial, whether the jurors

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give a verdict or not, and whether the verdict be true or false. (*Gibbs v. Dewey*, 5 Cowen R. 503; 1 Bouvier's Law Dict., Embracery; Statutes of Nevada for 1861, Sec. 112, p. 79.) There is no such crime specifically recognized, either at Common Law or by the statutes of this State, as that of an attempt to commit embracery. As the crime itself consists of a mere attempt to do an act or to accomplish a result, it is difficult to comprehend how there can be an *attempt* to commit such crime. Any attempt or effort corruptly to influence a juror, whether it be successful or not, is itself embracery. The crime may be committed though the object of the embracer be not accomplished, and his only act consists of an attempt to carry out a corrupt purpose. If, therefore, there be any act done to carry out such corrupt purpose, whether it be successful or not, such act would be sufficient to constitute the crime of embracery. Hence it would seem there can be no such specific crime as an attempt to commit embracery.

In other words, there can be no indictment for an attempt to commit a crime which crime itself is but an attempt to do a criminal act. It is a general rule of the Common Law that an attempt to commit a crime is itself a crime, but in our opinion, from the very nature of the crime of embracery, there can be no attempt to commit it. However, notwithstanding the demurrer to the indictment was well taken, we see no reason why the defendant might not be indicted and punished for soliciting and inciting another to commit the crime of embracery, if it can be shown that he did so.

The Common Law made it an indictable offense to solicit another to commit a felony or misdemeanor. (1 Russell on Crimes, 46.) In *Rex v. Higgins*, 2 East. R. 5, it was held that to solicit a servant to steal his master's goods was a misdemeanor, though it was not shown that the servant stole the goods, nor that any other act was done except the soliciting and inciting. In delivering his opinion in that case, Lord Kenyon says: "But it is agreed that a mere intent to commit evil is not indictable without an act done; but is there not an act done when it is charged that the defendant solicited another to commit a felony? The solicitation is an act, and the answer given at the bar is decisive that it would be sufficient to constitute an overt act of high treason." So Le Blanc,

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J., in the same case, says: "It is contended that the offense charged in the second count, of which the defendant has been convicted, is no misdemeanor, because it amounts only to a care, wish, or desire of the mind to do an illegal act. If that were so, I agree that it would not be indictable. But this is a charge of an act done, namely, an actual solicitation of a servant to rob his master, and not merely a wish or desire that he should do so. A solicitation or inciting of another, by whatever means it is attempted, is an act done, and that such an act done with a criminal intent is punishable by indictment has been clearly established by the several cases referred to." Whatever was a crime at Common Law is also punishable by Section 151, p. 88, of the Statutes of the State of Nevada, which declares that "all offenses recognized by the Common Law as crimes, and not herein enumerated, shall be punished in cases of felony by imprisonment in the Territorial Prison for a term of not less than one year nor more than five years, and in case of misdemeanors, by imprisonment in the County Jail for a term not exceeding six months nor less than one, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."

Under this view of the law, if the defendant solicited the attorney to employ money to corruptly influence the jury, he is indictable for inciting or soliciting another to commit the crime of embracery. But the indictment in this case does not sufficiently charge such an offense. The Court below, therefore, ruled correctly in sustaining the demurrer, and in re-submitting the case to another Grand Jury.

Judgment affirmed.

JAMES D. CHAMPION, RESPONDENT, v. E. C. SESSIONS
ET AL., APPELLANTS.

To enable this Court to reverse an order of the District Court, the error complained of must affirmatively appear. All presumptions are in favor of the regularity of the proceedings in the Court below.

When a bill is filed restraining County Commissioners from opening a road on the ground that they have not assessed the damages and provided for the payment

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thereof, it is error to grant a *perpetual* injunction. The Commissioners should only be restrained until they have complied with the preliminary requirements of the Statute.

APPEAL from the Fourth Judicial District, Washoe County, Hon. C. C. GOODWIN presiding.

This was a bill filed against the County Commissioners of Washoe County, to restrain them from opening a public highway through the lands of the plaintiff. The grounds relied upon to support the injunction were, that no damages had been assessed for the use of the land dedicated to the public, and no provision made for the payment of any damages that might arise. The District Court refused to grant the injunction, and dismissed the bill. The plaintiff appealed, and this Court reversed that order and sent it back for further proceedings. The District Court then made an order granting a *perpetual* injunction. From this the Commissioners appealed.

R. M. Clarke, for Appellants, made the following points :

1st. The Court erred in granting an injunction upon a default, without proof, and without notice to the defendants. (Statutes 1861, pp. 338, 339, sec. 150 ; Statutes 1864, p. 76, secs. 7, 8.)

2d. The Court exceeded its jurisdiction in enjoining the defendants from further proceeding with the opening of the road to the public. The defendants, as County Commissioners, had the undoubted right to open the proposed road to the public, after making or securing compensation to the plaintiff. Under the judgment they are denied this right.

Wallace & Flack, for Respondents.

There is no statement on appeal. The facts do not appear as suggested in appellants' first point.

The injunction is in accordance with the case made in the complaint, and is not erroneous.

Opinion by LEWIS, C. J., BEATTY, J., concurring.

It is claimed by appellants that the Court below erred in issuing the restraining order against the defendants without notice to them

of the intention to do so. But there is nothing in the record showing that such was the fact. It appears that after the filing of the remittitur of this Court in the Court below the restraining order was issued; but whether notice had been given to the defendants or not does not appear. In this respect the record shows no error. As all presumptions are in favor of the regularity of the proceedings of Courts of record, error to be available on appeal must be affirmatively shown.

We cannot presume that no notice was given to the defendants that would be in direct conflict with the rule of law above referred to. If the appellants wished to take advantage of that point upon appeal, they should have prepared a statement showing that no notice was given. Here there is no statement, and the appeal is simply from the judgment. The second point made by appellants is equally unavailable upon this record. Without saying whether it was necessary for the plaintiff below to introduce proof of the facts set out in his bill before a decree could properly be entered in his favor, we may say that the record does not show whether evidence was introduced or not: hence this point is open to the same objection as the first.

There is, however, an error in the judgment which will necessitate a modification of it. The injunction granted by the Court is final and perpetual, so that under no circumstances could the defendants hereafter proceed with the opening of the road in question, even if compensation should be tendered to the plaintiff for the land taken for that purpose. Such an injunction is not warranted by the pleadings or the law; for the defendants have an undoubted right to open the road by virtue of the provisions of an Act entitled "An Act in relation to Public Highways," approved March 9, A.D. 1866. (Laws of 1866, p. 252.) But this decree perpetually enjoins the defendants from opening the road through the premises of the plaintiff, whilst the only relief which the plaintiff's bill entitles him to is an injunction against the defendants until they have complied with certain requirements of the law above referred to. The decree must therefore be so modified as only to enjoin the defendants from opening the road in question until the probable damage which he will suffer thereby shall be ascertained, and provision made for the payment thereof, as required by section 5, of the Act of March 9th,

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1866. When the requirements of that Act are complied with, the road can be opened. But as the record brought before us shows no error but this in the judgment, we cannot reverse but only modify it as above stated.

The Court below will therefore modify the decree as we have suggested. The appellants are entitled to their costs.

J. B. LOBDELL, RESPONDENT, *v.* D. C. SIMPSON ET AL.,
APPELLANTS.

At common law, riparian proprietors were entitled to have the water naturally flowing over or past their land, continue so to flow without interruption or diminution.

But in California, owing to the peculiar situation of the lands therein, (belonging to the United States Government, but thrown open to the common use of miners and others) a different rule has properly been adopted. There the first appropriator of the water is held entitled without regard to the occupancy of the lands over which the water naturally flowed.

When a plaintiff claims water on the ground of prior appropriation, it is error in the Court to refuse an instruction to this effect: "The plaintiff is not entitled to any greater quantity of the water of Desert Creek than he actually appropriated prior to defendant's appropriation."

What would have been the rule if plaintiff had claimed by reason of occupancy of the land, and as riparian proprietor? Query.

Whether defendant could derive any right by conveyance from an Indian? Query. The first appropriator has the right to all water appropriated by him as against subsequent appropriators, and has the right to erect dams, divert water, etc., before any subsequent appropriation, but not to make any new dams or diversions of water after a subsequent appropriation.

A second appropriator has a right to have the water continue to flow as it flowed when he appropriated.

Plaintiff takes up land on a stream from which a part of the water has already been diverted by a ditch and dam. Subsequently defendant takes up the land on which the ditch and dam are situated. The plaintiff has no right to remove the dam.

APPEAL from the District Court of the Ninth Judicial District, Esmeralda County, Hon. S. H. WRIGHT, Judge of the Second Judicial District, presiding.

The plaintiff took up a piece of land on Desert Creek, for agricultural purposes, and used the waters of the creek for purposes of

irrigation. Subsequently the defendants took up a piece of the public land higher up, and on or near the same creek, and also used the waters of the creek for irrigation. The plaintiff brought suit against the defendants, praying for damages for past diversion of water, and an injunction against the future diversion of the waters of Desert Creek from his (plaintiff's) land. The plaintiff, to sustain his action, alleges prior appropriation of the waters of Desert Creek to the extent of 300 inches, and the subsequent appropriation by defendants of the waters of the creek so as to diminish plaintiff's supply below 300 inches.

The defendants, by way of answer, say that part of the waters of Desert Creek, long prior to the time plaintiff took up his land, had been appropriated at a point above plaintiff's claim. They deny that they have ever diverted any part of the waters of Desert Creek. On the contrary they aver that many years before either plaintiff or themselves had located their ranches, a dam had been erected across the channel of Desert Creek, which diverted a portion of its waters from the natural bed of the stream, and turned them over the land now occupied by defendants. That defendants had merely used the water turned over their premises by this old dam. That they had neither enlarged the dam nor the ditch running from the dam. That from natural causes the flow of water had, to some extent, been obstructed in the ditch leading to their place, and their supply was less now than when they took up their ranch in 1861.

On the trial the defendants attempted to show that the dam in the stream which plaintiff charged to have been erected by them was, in fact, erected by Indians before either the plaintiff's claim or their claim had been settled on. That they purchased from an Indian the right to the water as it then flowed in the ditch leading from this old dam, and located the land on which this ditch discharged itself. On the trial plaintiff objected to defendants' showing any right derived from an Indian.

Aldrich & DeLong, for Appellant, made a number of points not passed on by the Court. That an Indian has the right to appropriate water, and to transfer the possession thereof, was maintained, and the opinion of Chief Justice Hastings, in case of *Sunol v. Hepburn*, (1 Cal. 285) cited.

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The Court erred in refusing to instruct the jury that plaintiff was not entitled to any greater quantity of the water of Desert Creek than that he actually appropriated before the defendants' appropriation. (*Ortman v. Dixon*, 13 Cal. 36; *White v. Todd's Valley Water Co.* 8 Cal. 444; *Butte Canal and Ditch Co. v. Vaughn*, 11 Cal. 153; *Kidd v. Laird*, 15 Cal. 179.)

Quint & Hardy, for Respondents.

Indians have never been held capable of selling or transferring real estate, except to the Government. (3d Kent, 457 to 486.)

It would seem that the right to use water and transfer it, is in the same category. (See 1 Cal. 274, and *Hicks v. Coleman*, 23 Cal.

The first instruction asked by defendants was properly refused for two reasons :

1st. It was too broad, and calculated to mislead the jury.

2d. There is nothing in the record to show its applicability to the case on trial.

Opinion by LEWIS, C. J., BEATTY, J., concurring.

"Every proprietor of lands on the banks of a river," says Chancellor Kent, "has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run, without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him unless he has a prior right to divert it; or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua curret et debet currere ut currere solebat* is the language of the law. Without the consent of the adjoining proprietors he cannot divert or diminish the quantity of the water which would otherwise descend to the proprietor below, nor throw the water back upon the proprietors above without a grant, or an uninterrupted enjoyment of twenty years, which is an evidence of it." This is the clear and well-settled general doctrine of the common law of water courses. The quantity of water in a natural stream could in no case be diminished to the prejudice of other proprietors, except when necessary for domestic uses, and for the watering of stock. If a reasonable use of the water for

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these purposes materially diminished the quantity to the prejudice of the proprietors below, no action would lie, because these were considered privileged uses. Some of the Courts have held that it might also be taken for the purpose of irrigating land, though the proprietors below were prejudiced thereby; the weight of authorities, however, would seem to be against those decisions.

Whilst every riparian proprietor has a right to the reasonable use of the water for any purpose which does not diminish its quantity or deteriorate its quality to the injury of those below him on the same stream, he has no right to use or detain it upon his own land for any purpose which would result prejudicially to any other; *sic utere tuo ut alienum non loedas* is the maxim which the Courts recognize as a rule which must govern riparian proprietors in the use of running water. The anomalous condition of the settlers and miners upon the public land in California has induced the Courts of that State to depart from the strict rules of the common law, and to recognize priority of appropriation as a foundation of right to the use of running water. The rule adopted in California, when viewed in the light of the necessities which induced its adoption, is founded upon the clearest principles of justice. The right to land in that State, resting as it did for years upon no other titles but that of prior occupation and appropriation, the right to the use of running water was also acquired in the same way. So the doctrine is well settled in California that as between persons claiming water, merely by the appropriation of the water itself, he has the best right who is first in time. "We presume that it is not to be doubted," says Judge Baldwin, in the case of *Ortman v. Dixon et als.*, 13 Cal. 38, "that the defendants having first appropriated the water for their mill purposes, are entitled to it, to the extent appropriated, and for those purposes to the exclusion of any subsequent appropriation of it, for the same or any other use. We hold the absolute property in such cases to pass by appropriation as it would pass by grant." So in the case of *Butte Canal and Ditch Company v. Vaughn*, 11 Cal. 152, Mr. Justice Field, in delivering the opinion of the Court, says: "The first appropriator of the water of a stream passing through the public lands in this State has the right to insist that the water shall be subject to his use and enjoyment to

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the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purpose of its appropriation.

In this action the plaintiff seems to have relied solely upon his prior appropriation of the waters of Desert Creek. No rights by virtue of his riparian proprietorship seem to have been claimed. True, in the amended complaint it is alleged that the natural channel of the stream passed through his land, and that the waters of the creek naturally flowed into and upon his premises. It is admitted, however, in the record, that he had no title to the premises, except as a mere occupant of public land, and he does not claim that thereby he is entitled to have all the waters of the creek flow in its natural channel upon his land, but simply that he is entitled to a certain quantity of water actually appropriated by him, to wit: three hundred inches. The entire complaint shows that nothing was claimed by the plaintiff by virtue of his occupancy of the land, but only by his actual appropriation of the water itself; and the prayer is that the defendants, their agents, servants, employés and all persons having or claiming to have interests by, through or under them, be enjoined from appropriating any of the water of Desert Creek *except the surplus over and above* what the ditches aforesaid will convey, to wit: three hundred inches of water with a six-inch pressure, and that the Court decree to the plaintiff the right to that quantity of the water of said creek. As the main issue raised by the pleadings is priority of appropriation, the Court erred in refusing to instruct the jury, as requested by the defendants, that "the plaintiff is not entitled to any greater quantity of the water of Desert Creek than he actually appropriated prior to the defendants' appropriation." What we might hold if the plaintiff had relied upon his rights as a riparian proprietor, and claimed the water of the creek by virtue of his ownership of the soil, it is unnecessary to say at present. We wish it understood, however, that the views expressed in this opinion are applicable only to those cases where the parties rely solely on the prior actual appropriation of water, which seems to be the case here. We do not deem it necessary to consider the question as to whether the Indian from whom the defendants claimed title could convey any right to them or not; for if the facts are correctly pleaded in the answer, and they can be established by proof, the defendants have

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a right to divert the water used by them independent of any right existing in or derived from the Indian. It is alleged in the sworn answer of the defendants, that the dam and ditch complained of by the plaintiff, and by which they divert the water from the natural channel of the creek, existed not only when the plaintiff located upon the stream below, but when defendants located their land above plaintiff, and that their ditch had been in no wise enlarged or the dam raised since the location and appropriation by the respective parties plaintiff and defendants. The first appropriator of the water of a stream has undoubtedly a right under the decisions in California to the quantity of water actually appropriated by him as against any one subsequently appropriating any of the water of the same stream, and he has a right to remove any obstructions from the natural channel. But so soon as others locate upon the stream or appropriate the water, the first locator has no right to make any change in the channel, either to raise or lower any dams, or to close up any ditches which may have existed at the time of his own and the location of others, if others are injured thereby. In other words, a person locating upon a stream and appropriating the water has a right to have it flow (so far as the natural channel is concerned) in precisely the same manner as it did when he located; and no prior locator has any right to make any such change in the natural channel as will injure subsequent appropriators of the same water. If, as in this case, there was a dam in the stream, and a ditch conveying a certain quantity of water upon public and unoccupied land above the plaintiff at the time the plaintiff located, and he had not disturbed either, and the defendants take up the land and ditch, the plaintiff would have no right after such location by the defendants to destroy the dam or close up the ditch of defendants, if by so doing the defendants would be damaged. Neither would the defendants have any right to raise their dam or enlarge their ditch so as to deprive the plaintiff of the quantity of water appropriated by him. But they, on the other hand, have a right to claim that no dam which existed at the time of their location shall be torn down, if the tearing of it down would prejudice them.

The evidence in the case not being brought up, we are unable to determine what the rights of the defendants are; but if the facts

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exist as set forth in the answer, they have a right to maintain the dam as they found it at the time of their location. However, as the judgment must be reversed upon the error of the Court in refusing to give the instruction above referred to, we deem it unnecessary to give the question any further consideration.

Judgment reversed, and new trial ordered.

SAMUEL MCFARLAND, RESPONDENT, v. O. H. P. CULBERTSON ET AL., APPELLANTS.

An occupation of timber land within boundaries clearly marked and defined, constitutes possession, without any actual inclosure of such lands by fence.

The law only requires such possession to be taken as will make the land available and useful to the occupier. Arable and meadow lands must be inclosed to be valuable for any useful purpose. Timber land need only to be marked out to show within what boundaries the occupant claims.

Prior possession of land by the plaintiff, and ouster by defendant, makes a *prima facie* case for plaintiff, and throws the burthen of proof on defendant to show that he has some superior right.

It is not sufficient for defendants to show the land is subject to pre-emption. They must show all the facts which establish their rights as pre-emptors.

The plaintiff having shown his right as an occupant, the defendants, to have protected their possession, should have shown the land subject to pre-emption, and themselves of that class of persons entitled to pre-emption rights.

A certificate of the Register of the Land Office that defendants had filed a declaratory statement in his office, did not prove that they were of the class of persons entitled to pre-empt. If the declaratory statement might be received as evidence on that point, at least that statement, or a certified copy thereof, should have been introduced.

APPEAL from the District Court of the Fourth Judicial District, Washoe County, Hon. C. C. GOODWIN presiding.

The facts are stated in the Opinion.

Pitzer & Keyser, for Appellants.

The evidence was insufficient to support the verdict. No possession under any statutory provision was proved, and no actual occupation was shown. (*Murphy v. Wallingsford*, 6 Cal. 649, and *Kile v. Thubbs*, 23 Cal. 435.)

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The verdict was against law, because it was contrary to the instructions of the Court.

The Court erred in instructing the jury that the certificate of the Register of the United States Land Office was not evidence of possession. (*Gallup v. Armstrong*, 22 Cal. 480.)

The Court erred in refusing some of the instructions asked by defendant, and in the general charge given to the jury.

Wallace & Flack, for Respondent.

It is admitted that there are some inaccuracies in the instructions. But all the material errors are on the side of appellants. This Court will not reverse a cause for mere technical errors, which could not have prejudiced the jury against appellants, especially when the facts proved show that under no proper instructions could the verdict have been different. (*Dwinelle v. Henriques*, 1 Cal. 387.)

The whole of the instructions must be examined together to see if they were prejudicial to appellants.

(See case just cited, and *Carrington v. Pacific Steamship Co.*, 1 Cal. 475.)

Opinion by LEWIS, C. J., BEATTY, J., concurring.

This is an action of ejectment brought by respondent to recover possession of a tract of timber land located in the county of Washoe, and containing about six hundred and forty acres. The defendants deny the plaintiff's ownership and right of possession, and two of them, Hughes and Barney, plead ownership and right of possession in themselves, each to a quarter section of the premises in dispute. The trial was had by a jury, and the verdict and judgment were for the plaintiff. Defendants appeal. The testimony presented by the record clearly establishes the following facts:

- Early in the year 1861, four persons, D. R. Wood, W. H. Moe, E. S. Simmons, and Heusted Moe, located the premises in question, felled trees around the entire tract so as to distinctly mark its boundaries, and resided upon the land thus inclosed until September, A.D. 1861, at which time they, or a majority of them, conveyed to the plaintiff, Samuel McFarland. Shortly after this conveyance to the plaintiff, he built a saw mill and several other buildings

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on the premises. As soon as the mill was completed it was employed in sawing the timber cut from the land in dispute, and the men employed at the mill, and in getting out logs, lived on the premises. The mill was kept in operation until the fall of 1865, when the plaintiff removed the machinery to Summit City, but employed a man or two to remain on the land, and they were there in November, A.D. 1865, when the defendants went on and ousted the plaintiff, and commenced cutting the timber, claiming that as the land had been surveyed by the General Government, the plaintiff had no right to the possession of more than one hundred and sixty acres, whereas he was claiming and attempting to hold six hundred and forty. The two principal points made by the appellants on this appeal are: 1st. That as the plaintiff failed to prove a sufficient inclosure of the premises, the verdict was not supported by the evidence; and 2d. That as the land in controversy was surveyed by the General Government and open to preëmption, the plaintiff had no right to the possession of more than one hundred and sixty acres. Upon the first of these points we are well satisfied that the appellants are in error. The Courts of this State have uniformly held that a perfect inclosure of timber land is not necessary. To build a fence that would turn stock would be an utterly useless act, and one which the Courts have never required. If there be an occupation within boundaries so clearly marked and defined as to notify strangers that the land is taken up or located, it is all the possession which the Courts of this State have ever deemed necessary to require. The timber land in this State is usually of no value except for the wood and timber which may be taken from it; no fence would be necessary to subject it to the complete control of a person locating it for that purpose. The land would be as useful without being inclosed by a fence as if it were, whilst arable or farming lands would not. Usually, arable or meadow land can only be subjected to the purposes for which it is most useful by such an inclosure as will turn stock. Hence, the Courts have repeatedly held that such land must be inclosed by a substantial fence; but as the law never requires a vain thing to be done, the Courts require nothing more than a distinct marking of the boundaries of timber land, and an actual occupation within those boundaries. This distinction was recognized by this Court in the case of *Sankey v.*

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Noyes, 1 Nev. 68; and the Supreme Court of the Territory, in the case of *Alford et als. v. Dewing et als.*, distinctly held that the inclosing of timber land with a substantial fence was entirely unnecessary.

In this case, the inclosure seems to have been much more perfect than usual. It is clearly shown by the testimony introduced by the plaintiff that the fence, which consisted of felled trees, brush, and stone, was continuous and unbroken around the entire claim, except upon one side, where there was an opening of some few yards, but upon that side it joined a tract which was completely inclosed with the same character of fence. Though it seems to be conceded that the fence was not sufficient to turn stock, yet it is established beyond question that it distinctly marked the boundaries of the plaintiff's claim. That character of inclosure, together with the continuous occupation by the plaintiff, certainly constituted such a possession as would entitle him to recover in ejectment against any subsequent locator who had no title from the Government.

But, say counsel for the defendants, this land is surveyed by the General Government and is open to pre-emption, and the plaintiff has no right to the possession of more than one hundred and sixty acres. Priority of possession is always sufficient to support a recovery in ejectment. When, therefore, a plaintiff shows his prior possession and an ouster by the defendant, that entitles him to a recovery unless the defendant shows a superior or better right to the possession in himself. In this case, the plaintiff's possession was unquestionably earlier than that of the defendants, and therefore, unless the defendants show better right in themselves the plaintiff should recover. The mere fact that the land is subject to pre-emption does not necessarily entitle the defendants to possession of any of it as against the plaintiff. True, the Government gives the right to pre-empt only one hundred and sixty acres to each person. It does not recognize the right of all persons even to pre-empt one hundred and sixty acres. Only those who are citizens of the United States, or who have declared their intention to become so, are twenty-one years of age, and have not pre-empted before, and who are not the owners of three hundred and twenty acres of land, have the right to pre-empt even a hundred and sixty acres of land. Should they not be citizens, or not have declared their intention to become so,

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or should be under twenty-one years of age, they would have no rights whatever under the pre-emption laws of the United States. Independent of the pre-emption laws, the plaintiff's prior possession of the four hundred and sixty acres undoubtedly entitled him to recover. If then the defendants, who claim a portion of the land by subsequent settlement upon it, rely upon the pre-emption laws for protection, or for a right to the possession as against the plaintiffs, they must show affirmatively that the land is surveyed and open to pre-emption, *and that they have a right to the possession by virtue of a pre-emption right*; that is, they should have shown that they were citizens of the United States, or had declared their intention of becoming so, and that they were over twenty-one years of age. Unless these facts be shown, how is the Court to know that they have any rights whatever; that they are not mere naked trespassers upon the public land, with no possible right to pre-empt the premises from which they have ousted the plaintiff? Though the plaintiff himself have no pre-emption right, his proof of prior possession entitles him to retain the possession against all persons having no better right, and the defendants certainly could not have if they had not the right to pre-empt. The defendants introduce no proof whatever to show that they could pre-empt. There is no evidence of their citizenship, or age, and nothing to show that they had not exhausted their rights by a former pre-emption. They therefore showed no right which would overcome the plaintiff's prior possession. Had the defendants shown themselves entitled to pre-empt by proof of the necessary facts, and that the land was open to pre-emption, that might possibly have been sufficient to overcome the plaintiff's right of recovery, for the right of possession must accompany the right of pre-emption. But as that was not done, the verdict and judgment were correct. As to the charge of the Judge upon the effect of the Register certificate that the defendants had filed a declaratory statement in the Land Office, we may say, as did the Judge below, that it was not evidence of title or right of possession. The declaratory statement itself was not introduced or offered in evidence, nor is there anything to show that the defendants were citizens, or that they could claim any right of pre-emption even if the declaratory statement were itself regular. The certificate of the land officers that the defendants had filed a

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declaratory statement amounts to nothing more than a certificate that they have declared that they were entitled to a pre-emption right upon a certain quarter section of land. Had the declaratory statement, or a certified copy of it, been introduced in evidence, it would only have proven that the defendants had taken the first step towards the pre-emption, without establishing any title or right of possession in themselves. In any event, if the defendants wished to derive any advantages from the filing of a declaratory statement, they should have introduced the statement itself, or a certified copy of it, so that the Court below might judge of its effect. As it was, the certificate of the Register of the Land Office amounted to nothing. As the general views which we have expressed will cover the error complained of in the instructions of the Court below, it is unnecessary to give them any special consideration.

Judgment affirmed.

C. B. ZABRISKIE, RESPONDENT, *v.* JAMES F. MEADE ET AL.,
APPELLANTS.

2	285
21	166
26*	229

One who brings an action to recover real estate purchased under execution cannot show that the execution issued under a different judgment than the one recited on its face, nor can he contradict the recitals in the deed under which he claims.

If a defendant in execution has no title to premises in question, either at the date of sale, or at any time subsequent to the period when the judgment was rendered, as appears by the recitals in the execution, in the advertisement of sale, in the certificate of sale and the Sheriff's deed, a party claiming under such execution sale will not be allowed to show that the true date of the judgment under which the execution was issued was different from all those recitals.

APPEAL from the District Court of the Third Judicial District,
Lyon County, Hon. W. HAYDON presiding.

The facts are stated in the Opinion.

Aldrich & DeLong, for Appellants.

J. Neely Johnson, for Respondent.

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Opinion by LEWIS, C. J., BEATTY, J., concurring.

The judgment in this case is clearly contrary to the evidence, and must therefore be reversed; the title proven by the plaintiff upon the trial being based upon a judgment which it appears was rendered long after the premises had been conveyed by the judgment creditor to one Rawlings, from whom the defendants claim title.

If the recitals in the execution, certificate of sale and Sheriff's deed, which were introduced in evidence by the plaintiff to establish his title, be received as correct, the Sheriff sold property not belonging to the judgment creditor, but which was claimed by the grantor of the defendants by virtue of a deed which had been executed and recorded nearly a year before the rendition of the judgment upon which the sale was made to the plaintiff. It appears from the record that in the month of June, A.D. 1863, one C. C. York entered into an agreement with John Rawlings, by which he agreed to sell to him the premises in dispute for the sum of three hundred dollars, payable in monthly installments of fifty dollars; that on the twenty-third day of November, A.D. 1863, York and wife, in compliance with the agreement, executed a deed of the premises to John Rawlings; and on the twenty-second day of January, A.D. 1864, the same was recorded in the office of the County Recorder of Lyon County; and on the twentieth day of April, A.D. 1865, Rawlings conveyed to the defendants in this action. This is the title made out and relied on by the defendants. The plaintiff, to support his claim, introduced in evidence a judgment of the Probate Court of Lyon County, rendered on the sixteenth day of November, A.D. 1863, in his favor and against C. C. York, for the sum of one hundred and forty dollars and costs of suit. Upon this judgment an execution was issued on the eighteenth day of November—two days after the rendition of the judgment—by virtue of which some little personal property was seized and sold, but not sufficient to satisfy the judgment. On the twentieth day of January, A.D. 1864, an alias execution was issued and returned unsatisfied; and on the twenty-third day of November, A.D. 1864, an execution is issued in an action entitled *C. B. Zabriskie v. C. C. York*, by virtue of which the premises in dispute were sold to the

plaintiff in this action. The probability is that this execution was issued upon the judgment rendered on the sixteenth of November above referred to, but it recites that it is issued upon a judgment rendered on the sixteenth day of November, A.D. 1864, and it commanded the Sheriff to satisfy the judgment out of the personal property of the defendant C. C. York, and if sufficient personal property could not be found, then out of the real property belonging to the defendant on the day upon which said judgment was docketed, or at any time thereafter. The Sheriff certifies that on the twenty-fifth day of November, A.D. 1864, by virtue of this execution he levied upon and sold the premises in dispute to the plaintiff C. B. Zabriskie, for the sum of two hundred and twenty-six dollars. The notice of sale also recites that the property was levied on by virtue of an execution issued upon a judgment rendered in the Probate Court for the County of Lyon on the sixteenth day of November, A.D. 1864. The certificate of sale also refers to a judgment rendered in November, A.D. 1864, as that under which the sale was made, and the Sheriff's deed, which was executed on the thirteenth day of July, A.D. 1865, contains the following recitals :

“Whereas, by virtue of a writ of execution issued out of, and under the seal of the Probate Court of the Third Judicial District of the State of Nevada, in and for the County of Lyon, tested the 23d day of November, A.D. 1864, *upon a judgment* recovered in said Court on the 16th day of November, A.D. 1864, in favor of C. B. Zabriskie and against C. C. York, to the said Sheriff directed and delivered, commanding him that of the personal property of the said judgment debtor in his bailiwick he should cause to be made certain moneys in the said writ specified ; and if sufficient personal property of the said judgment debtor could not be found, that then he should cause the amount of said judgment to be made out of the lands, tenements, and real property belonging to him on the 23d day of November, A.D. 1864, or at any time afterwards ;” and the deed then recites, that sufficient personal property not being found, the Sheriff levied upon and sold the premises in dispute in this action to the plaintiff, C. B. Zabriskie. There seems to have been no attempt to show that the date of the rendition of the judgment, as stated in the execution, notice of sale, certificate and deed was a mistake, or to show that any other judgment than that of November

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16th, A.D. 1863, was ever rendered; and yet the execution, notice of sale, and deed, all refer to a judgment rendered in November, A.D. 1864, a year after the sale of the premises by York to Rawlings. As the execution only authorized a levy and sale of such real property as belonged to York in November, A.D. 1864, and as the Sheriff did not levy upon or convey anything else, it follows that the plaintiff got nothing by the sale, because the property sold was not the property of the defendant, nor subject to the lien of the judgment, and the sale was, therefore, wholly unauthorized, it being the sale of the property of Rawlings to satisfy a judgment against York. Whether the judgment referred to in the execution and deed be in fact the one rendered in November, A.D. 1863, or whether there was another judgment rendered a year later, we cannot determine from the record. In the disposition of this case, however, we must take the recitation in the deed as conclusive that there was a judgment rendered in November, A.D. 1864, and that the sale of the property in dispute was made to satisfy it. Even if there had been an attempt to correct or contradict the deed by showing that the levy and sale were made under a judgment rendered in November, A.D. 1863, it would have been inadmissible in this action. The recitals in the Sheriff's deeds are conclusive between the party making them and those claiming under the deed.

Donahue v. McNulty et als., 24 Cal. 411. In delivering the opinion in that case, Mr. Justice Currey says: "The officer who makes a sale and executes a conveyance of land under and by virtue of a judgment and execution, must necessarily make some reference in his deed to the authority under which he acted, and to the character of such authority. This is essential for the purpose of showing a transmission of the debtor's title in the property to the purchaser and grantor thereof. This is done by recital of certain facts constitutive of the officer's authority to sell and convey, and when this is done, those who claim under the deed are estopped from denying the truth of the facts recited." So in the case of *Jackson v. Sternberg*, 20 John. 50, it was held that parole evidence was inadmissible to contradict the recital, or show that the land was sold under a different judgment and execution than those recited in the deed.

The plaintiff could not, therefore, in this action have been per-

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mitted to contradict the Sheriff's deed, upon which he relied, by showing that the sale took place under a judgment rendered at a time different from that mentioned in the deed, even if he had been desirous of doing so. But we do not see that the correction of the deed would help the plaintiff in the least, for the execution only authorized the Sheriff to sell such real property as York, the judgment debtor, was the owner of on the 16th day of November, A.D. 1864; and the record in this case clearly shows that, long before that time, York had conveyed away the premises levied on by the Sheriff, and that he had no interest in them on the 10th of November, A.D. 1864; hence the sale by the Sheriff was an absolute nullity, as much so as if he had levied on the property of an entire stranger to all parties to the proceedings in which that judgment was rendered. For it is now too well settled to admit of question, that a purchaser at a sale of real property under execution gets only such interest as the debtor possessed at the time of the lien of the judgment. If the judgment debtor has nothing, the purchaser gets nothing. (*Boggs v. Hargrave*, 16 Cal. 559.)

In this case York, the judgment debtor, had no interest in the property on the 16th November, A.D. 1864, the time stated in the execution when judgment was rendered, and, therefore, the purchaser, Zabriskie, gets nothing by the sale.

Judgment reversed.

2	289
19	48
5*	669

WM. SHARON, APPELLANT, v. G. W. SHAW, RESPONDENT.

When real estate is sold, and at the same time possession of the realty is delivered by the vendor to the vendee, a bill of sale from the same vendor to the same vendee is given for the personal property in and on the real estate sold, the possession of the personal property passes with the possession of the realty, and no removal or other delivery of the personal property is necessary than that arising from contract and the actual change of possession of the realty. But when the same bill of sale is also of other property not on the real estate sold, there must be other and actual delivery to pass the possession as against creditors.

The mere request made to a servant of the vendor who has the property in actual possession, to keep it for the vendee, without any removal or change in the situation of the property, is not an actual delivery or change of possession of the property.

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APPEALED from the District Court of the Third Judicial District, Lyon County, Hon. W. HAYDON presiding.

The facts are stated in the Opinion.

Crittenden & Sunderland, for Appellant.

The verdict was against the weight of evidence. The proof was of a delivery which, although not made precisely at the time of delivery of bill of sale, was yet *immediate*, as that term is used in the statute. Upon what constitutes immediate delivery, see the following cases: *Chaffin v. Doub*, 14 Cal. 386; *Lay v. Neville*, 25 Cal. 552; *Goodschaux v. Mulford*, 26 Cal. 316.

A delivery to the plaintiff's agent was as effectual as to himself. (*Goodwin v. Garr*, 8 Cal. 617.)

The delivery of the keys of the rooms containing the goods, was a delivery of the goods. (2 Kent, 646 [marginal page, 501]; 2 Parsons on Contracts, 323-4; *Burton v. Goddard*, 3 Mason, 111; *Gibson v. Stephens*, 8 Howard, 384; *Stevens v. Irwin*, 15 Cal. 503; *Packard v. Dunsmore*, 11 Cushing, 282, also 12 Cushing, 29.)

Sharon owned the real estate, and it was therefore unnecessary to remove the personal property. (14 Cal. 124.)

The Court erred in refusing to instruct the jury in regard to the word *immediate*. And that a delay of six or seven hours between the delivery of the bill of sale, and of the articles sold, was not material. We refer to cases already cited, and more particularly to: *Walden v. Murdock*, 23 Cal. 553-4; 11 Pick. 352, and 18 Pick. 202.

Williams & Bixler, for Respondent.

Opinion by LEWIS, C. J., BEATTY, J., concurring.

This action was brought for the purpose of recovering possession of certain personal property from the defendant, who is the Sheriff of the County of Lyon, and who justifies under a writ of attachment issued out of the District Court of his county. The plaintiff claiming title from Tregloan, the person against whom the attachment was issued, introduced in evidence a bill of sale from him of

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all the personal property now in controversy, dated October 31st, A.D. 1865, and also a deed bearing date June 1st, A.D. 1865, by which certain real estate (upon which a portion of the personal property was situated) was conveyed to the plaintiff.

It was also proven at the trial that a large portion of the personal property was kept in the cellar of the boarding-house, which, it appears, was not located on the premises conveyed by the deed of June 1st. This deed, though executed on the first of June, was not placed on record until the night of the thirty-first day of October, when the bill of sale was executed.

The plaintiff, Mr. Sharon, gives as a reason for this delay, that the deed was delivered to him with the understanding that at any time when he might consider the bank, for which he was acting, not entirely secure, the deed might be placed upon record. On the thirty-first day of October, the grantor, Mr. Tregloan, informed the plaintiff that he did not think he could discharge his indebtedness to the bank, and offered to surrender all his property in discharge of it; this offer was accepted, the bill of sale executed in compliance with this understanding, and the same evening the deed of the real estate was placed upon record. The deed conveyed the premises upon which the Swansea mill is located, together with the mill, batteries, engines, boilers, pans, and all other machinery belonging or appertaining thereto. It appears that there was a boarding-house owned and conducted by Tregloan in connection with this mill, but not located on the premises conveyed by the deed. Much of the personal property transferred by the bill of sale, was kept in the cellar of this boarding-house; the balance was kept on the premises conveyed by the deed.

On the morning after the execution of the bill of sale and the recordation of the deed, the plaintiff, by his agent, took possession of the premises. The agent also informed the persons who were employed at the boarding-house of the sale, and engaged them on behalf of the plaintiff to remain in his employ.

Tregloan delivered a bunch of keys to Johns, the plaintiff's agent, among which was the key to a building occupied as the office; but it appears that the key to the cellar of the boarding-house, where much of the property in question was kept, was not delivered with the others, it being in the possession of Mrs. Washburn,

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who was employed to take charge of the cooking for the employés of the mill. Nothing was done towards taking possession of the personal property in the boarding-house cellar, except that Johns informed Mrs. Washburn of the sale, and requested her to remain as the employé of the plaintiff. On the morning of November 1st, after the delivery of possession of the premises, the Sheriff levied upon the personal property in question, a portion of which was in the office, some of it in the mill, and as before stated, much of it in the cellar of the boarding-house. Upon the trial, the defendant claimed that there had been no such delivery of the possession of the property as would transfer the title to the plaintiff, as against the creditors of Tregloan. The verdict and judgment were for the defendant. Plaintiff appeals. The principal question presented for consideration in this Court is, whether the delivery of the personal property by Tregloan to the plaintiff was sufficient to meet the requirements of the Statute of Frauds? Our conclusion is, that the delivery of that portion of the property transferred by the bill of sale which was in the mill and office or on the premises conveyed by the deed, fully met the requirements of the law. The bill of sale passed the right of possession, and the deed and the subsequent surrender of the possession of the real estate upon which the personal property was kept, was a complete delivery of the possession of that personal property. We are unable to see what further delivery or change of possession could have taken place. The plaintiff having received a conveyance of the real estate whereon all the personal property was needed for use, it would be a harsh construction of the law to hold that a complete delivery could not take place without a removal of it from the place where it had been kept by the vendor of the plaintiff. There was not only a transfer of the right of possession by means of the deed and bill of sale, but the plaintiff's vendor surrendered possession of everything about the premises, and delivered the keys to the agent of Mr. Sharon. Thus, the title and the possession were passed, and the deed which was placed upon record before the levy by the Sheriff imparted notice to the world that the premises upon which the personal property was kept, had been conveyed to the plaintiff. This, together with the actual possession of the premises by the plaintiff, would be sufficient to notify

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third parties of the transfer. There was not only the sale of the personal property and a delivery of the possession, but there were all the outward evidences of such sale which the circumstances of the case admitted of. The conveyance and delivery of the possession of the real estate and the recordation of the deed operated precisely the same as a removal of the personal property from the premises entirely.

In our opinion, it is a matter of no consequence in the decision of this question whether the deed from Tregloan to Sharon would in equity be considered a mortgage. The deed is absolute on its face, and a delivery of possession of the real estate took place under it. Whether that possession was obtained by virtue of a deed absolute, mortgage or lease, the result here must be the same.

As to the property kept in the cellar of the boarding-house, there seems to have been no such delivery and change of possession as the law contemplates. That portion of the property was not on the premises conveyed by the deed, and the key to the cellar where it was kept was not delivered with the others, but remained in the possession of the servant until it was taken from her by the Sheriff. The boarding-house not being included in the deed of conveyance, of course continued to be the property of Tregloan. The servant which he had employed before the sale, continued in possession of the house and the personal property in the cellar. There was no change, or apparent change of the possession of that portion of the personal property. Everything remained the same after as before the sale, and the fact that that house had not been conveyed by the deed, would of itself raise the presumption that no change had taken place as to it, or the property in it. As to that portion of the property, nothing was done towards a change of possession, except the notification of the servant who had charge of it, that it had been sold, and the employment of her in the same capacity by the plaintiff.

The authorities are uniform that that would not be such delivery and change of possession as is required by the law. So it was held by this Court in the case of *Doake v. Brubaker* (1 Nevada, 218) and by the Supreme Court of California, in the case of *Hurlburd v. Bogardus* (10 Cal. 519).

The transcript does not purport to contain all the evidence ad-

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duced at the trial, but from that which is presented it is shown affirmatively that there was not a sufficient delivery of that portion of the property which was in the boarding-house at the time of the levy by the Sheriff, to transfer the title to the plaintiff.

So far as the question of fraud in the conveyance and sale to the plaintiff is concerned, we find nothing in the record which would in any manner justify the jury in arriving at the conclusion that any existed.

The judgment must therefore be reversed, and a new trial granted.

J. T. LOCKHART, APPELLANT, *v.* THOMAS MACKIE, RESPONDENT.

Depositions will not be rejected for informality in the certificate of the officer before whom they are taken, when it appears that both parties were present, and the witnesses were cross-examined.

A stipulation of the parties to a suit may dispense with any certificate by the officer taking depositions.

It is too late to raise the objection in this Court for the first time that there was no proof of the absence of the witnesses whose depositions were read.

When a case is tried before a Court without a jury, and one of the facts found by the Judge, and the very one on which the case, in his opinion, turns, is wholly unsupported by evidence, this Court will not treat this particular finding as surplusage, in order to sustain the judgment on other findings, especially if the weight of testimony is against the other findings on which respondents seek to sustain the judgment.

APPEAL from a judgment of the District Court of the Fourth Judicial District, Hon. R. S. MESICK presiding.

The facts are stated in the Opinion.

Thomas Fitch and *C. N. Harris*, for Appellant, cited the following authorities to show that a verdict will be set aside merely on the ground that it is against the weight of evidence: 7 Mass. 261; 13 Mass. 507; 20 Pick. 285-9; 15 Pick. 291; 1 Met. 221; 7 How. Prac. 64; 6 Hill, 433-444; 1 Caine, 25, 162; 1 Marshall, 183-385; 4 Dana, 423; 1 Bibb, 129-570; 3 Bibb, 35, 224; 4 Little,

259 ; 4 Monroe, 482 ; 7 Monroe, 223 ; 3 J. J. Marshall, 421 ; 2 Bibb, 33 ; 3 J. J. Marshall, 442.

That it was the duty of parties offering depositions to show that the witnesses whose depositions were offered, were still absent, they cited the following cases: 2 Cal. 33, 285 ; 2 Bibb, 90 ; 3 Bibb, 204 ; 4 Bibb, 521 ; 3 Little, 250 ; 4 Monroe, 366.

Clarke & Flack, for Respondents.

Opinion by BEATTY, J., LEWIS, C. J., concurring specially. .

This was an action brought for an ox team, wagon, etc. The wagon and a part of the cattle belonged to one Stockham in the year 1864, and both parties found their claim to the property on title derived from Stockham. The plaintiff claiming that Stockham sold to J. S. Bostwick, and Bostwick to plaintiff. The defendant's theory is that Stockham sold to Symington, and Symington to defendant.

The case was tried before the Judge without a jury, who found for the defendant, and the plaintiff appeals.

The plaintiff makes but two points in this Court: one, that certain depositions were improperly admitted in evidence, and the other that the findings of fact are not supported by the testimony.

The objections made to two of the depositions below was, that the certificate of the clerk before whom they were taken did not certify that they were *carefully* read to witnesses after being written out, and further failed to certify that the witnesses *did not wish to correct them after they were read*.

These objections, we think, are too technical, when it is shown, as in this case, that counsel on each side were present, and participated in the examination and cross-examination of the witnesses. Such an objection would certainly be entitled to grave consideration in a case where there were no cross-examination and no one present representing the opposing party.

The stipulation attached to the third deposition dispensed with all necessity of a certificate of any kind. A stipulation of the parties may certainly supply the place of a certificate of the officer.

It is further objected in this Court that the record shows no proof that the witnesses, whose depositions were read, were not, at the

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time of trial, within the jurisdiction of the Court, and capable of being brought into Court to testify orally. That objection comes too late, being taken for the first time in this Court.

Had it been raised in the Court below, possibly the absence of the witnesses might have been shown so as to admit the depositions. The failure to raise the question there amounts to a waiver of that point, or an admission that the necessary preliminary proof could have been made.

Upon the other point, we think the appellant's position must be sustained. Plaintiff proved by Stockham that he had sold the cattle to Bostwick on the 20th of August, 1864; that Bostwick was a merchant to whom he was indebted, and that he was to be credited by Bostwick on his book with the price of the cattle, to wit: six hundred dollars; that he never made any sale or contract in regard to the cattle with Symington. Bostwick confirms this statement, so far as his purchase is concerned, and further states that, after making the contract with Stockham for the cattle he employed Symington to drive the team for him, and sent him to the pasture where the cattle were kept to get them. Here is the direct and positive evidence of two witnesses to the fact that the sale was made to Bostwick on the 20th of *August*, a date which, we will see hereafter, becomes somewhat important. Also the testimony of one witness, Bostwick, that within a day or so after his contract of purchase, he sent his employé, Symington, to get the cattle for him.

On the other hand, the defendant proves, by Symington, that he (Symington) bought the same team of Stockham on the 28th or 29th of July, and that he drove the team from that time (July 28th or 29th) as his own team, and never hired to Bostwick to drive his team.

Here there are two distinct theories, and a flat contradiction between the two. The question is, whether Stockham and Bostwick perjured themselves, or whether Symington was the guilty party. It cannot be questioned that one side or the other committed perjury.

Symington showed, on his examination, that he was totally unworthy of belief. There are some contradictions and discrepancies in his statements calculated to throw suspicion on his testimony. But the remarkable feature is, that he describes with particularity

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a certain order that he wrote ; declares positively when questioned that he himself wrote it ; yet on the trial it was shown that he could not write, (except to sign his name) beyond that he could not write a word. On the other side, there was an attempt to impeach the credibility of Bostwick by direct testimony as to his general character. The Judge below thinks this attempt was a failure. We certainly think that the weight of the testimony was in favor of Bostwick. He seems to have been somewhat engaged in the lumber business, and the wood-choppers and lumbermen generally spoke harshly of him. Frequently, a man by a rigid enforcement of his rights, by a pertinacious stickling for small things which are, in fact, perfectly right, will as effectually incur the displeasure of laborers as by actual dishonesty. On the other hand, the merchants and business men of the town where Bostwick lived gave him an excellent character.

We think, so far, Bostwick must stand unimpeached. There was no direct attack on Stockham, and his testimony seems to be straightforward and consistent.

So far as those three principal witnesses are concerned, all the evidence entitled to any weight is on one side. The only other testimony of any consequence is the detail of conversations held with Symington, with Bostwick and with Stockham. In other words, the admissions of witnesses of the existence of a state of facts different from those sworn to on the trial.

A. J. McCreery says that he asked Symington who the cattle belonged to, and he replied that they were his when he paid for them — that Bostwick held them. John Bostwick, brother of J. S. Bostwick, swears Symington applied to him for money to pay bill due on team ; stating he was driving for J. S. Bostwick ; that the team belonged to J. S. Bostwick.

J. S. Watson proves that he was present when Symington was about to start to Winnemucca Valley for the team ; that Bostwick gave him money, and directed his clerk, Parker, to give Symington an order for the team.

There is also much testimony to show that J. S. Bostwick paid all the bills for keeping cattle, etc.

On the other hand, there are a number of witnesses called to prove

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statements made by J. S. Bostwick and Stockham inconsistent with their sworn evidence.

One J. Davies testifies that J. S. Bostwick once said to him he had better have done as Symington did, and then he would have work. Davies replied, if he would buy a team and haul for Bostwick, Bostwick would soon own both him (Davies) and the team. Bostwick made no reply to this.

One Suther swears that Stockham, in August, 1864, informed him he had sold the team to Symington. But this Suther is shown to have been willing to sell himself to either side as a witness, and clearly his evidence was not entitled to any weight.

One Spiglehoff, who keeps a tavern on the road where the team was driven, learned in August, 1864, that the team was sold — thinks he learned from Stockham it was sold to Symington, and commenced charging the bills to Symington about the 1st of August, but within the month, by direction of Bostwick, charged bills to him (Bostwick).

One Montgomery swore he heard Stockham say Symington had bought a team, or got a team from him.

Peter Robinson swears he took an order from Symington, who owed him, to J. S. Bostwick. Bostwick refused to accept or pay the order, and said Symington owed him still for the cattle he bought for him; that he had to buy cattle for Symington to replace those that died, and that Symington had not paid him for them yet.

This was all the important testimony tending to shake the credibility of the witnesses J. S. Bostwick and Stockham, except the deposition of Tartan Smith, which we will hereafter mention. This kind of evidence is the weakest of all kinds of evidence, because it is more easily manufactured than any other kind, and if manufactured, more difficult to rebut. It is also liable to the objection that even honest and correct witnesses are always liable to misunderstand and incorrectly report mere casual conversations in which they have no particular interest. Symington, too, made admissions just as inconsistent with his testimony as those made by Bostwick and Stockham, if all the witnesses are to be believed.

Then there is the deposition of one Tartan Smith, which fixes particularly the date that Symington came to a pasture in his charge where the oxen were pastured, and claimed that he had at that

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time bought the cattle from Stockham. This, he says, was on or about the 22d of August (the time Bostwick says he sent Symington for his cattle).

The next day after Symington came and got the cattle, Stockham came and said he had sold them to Symington, and from that time forward the bills for pasturing them were to be charged to Symington.

He then went down to Bostwick's, and Bostwick told him to keep Symington's cattle, that Symington was hauling for him and he would pay the bills weekly, and when at the end of the week the bill was presented to Bostwick, he, Bostwick, paid the bill and informed witness he had nothing to do with the cattle, except that he wished to keep Symington along.

This deposition certainly makes out a complete case for Symington, if it is to be believed. But certainly the very completeness of the deposition, the fact that it covers every point in the case so entirely, casts some suspicion on the testimony. But there is a stronger objection to it. The whole deposition taken together fixes the date of Symington's purchase between the twentieth and twenty-fifth of August, a date corresponding with the alleged purchase of Bostwick, and nearly a month after his alleged purchase, which by his own showing was the twenty-eighth or twenty-ninth of July.

It looks as if when this deposition was given, Symington's intention was to claim the purchase as having been made by him at the time he took the cattle from Winters' pasture, about the twentieth or twenty-second of August. But at the trial, for some reason or other, he changes his base, and claims to have bought them in July. If Smith's testimony impeaches the statements of Bostwick and Stockham, it equally impeaches the testimony of Symington. Taking the whole testimony together, the case is involved in much doubt, with an apparent decided preponderance of testimony in favor of plaintiff, who derives title from Bostwick. But if there had been a general verdict of a jury the other way, and the Court below had approved that verdict, this Court would not probably have felt authorized to interfere. In this case, however, there was no jury, the case having been submitted to the Court by stipulation without a jury. The Judge who tried it wrote a long

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and able opinion reviewing the testimony, with most parts of which we fully concur. He also filed a special finding of facts. One of those findings, and the one which is the foundation of defendant's right to a judgment, is as follows :

" *First*—In the month of August, A.D. 1864, one Stockham was possessed of an ox team as his own property, composed of eight oxen, together with the wagon, yokes, chains, etc., mentioned in the complaint, and whilst so possessed, sold and delivered the same to Jacob Symington for the price of six hundred dollars, of which price the sum of eighty-four dollars and forty cents was immediately paid, and the balance to be paid in service with the team, a portion, if not all, of which service was subsequently rendered ; but no bill of sale was given, the plaintiff [meaning Stockham] reserving the legal title in himself until the price of the team should be paid."

There is absolutely no testimony in the case supporting the latter part of this finding. Symington does not assert a conditional sale to himself in August, but an absolute sale in July. Tartan Smith's testimony, as it regards the declarations of Symington, of Stockham, and of Bostwick, refers only to an absolute sale.

The only language in all the testimony which could be tortured into a reference to a conditional sale, is that of A. J. McCreery, who testified that " Symington said they were his when he paid for them ; that Bostwick held them." This language would indicate that Symington claimed some sort of contract for the purchase of the cattle from Bostwick ; not that he had bought them from Stockham either conditionally or absolutely.

But this does not amount to sufficient testimony to justify any finding. It is a mere declaration of Symington in his own favor, which he afterwards contradicts under oath. It may, however, be said that the latter part of this finding is mere surplusage. That you may strike out all that part which refers to the reservation of title by Stockham, and it is then a good finding to support a judgment in favor of defendant. If the latter portion of the finding were stricken out, it is undoubtedly true that it would then be a good finding to support the judgment.

But the latter portion is a material part of the finding, and we do not think it can be thus summarily disposed of. We are not

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sure that the Judge who found a conditional sale would have been willing to find an absolute sale.

The learned Judge of the Court below admits that he was impressed throughout the trial with the improbability that Stockham would have sold his team to an irresponsible man like Symington, but got rid of this idea when he became possessed of the idea of a conditional sale, and Stockham's retaining the title in himself until the team was paid for.

If then he had not arrived at the conclusion that there was a *conditional sale* (and we think he had no testimony before him to arrive at such a conclusion) he would most probably have determined that the weight of testimony as to a positive sale was in favor of plaintiff.

Again, if there was a conditional sale, there is a total absence of testimony showing the exact conditions thereof. If there were conditions precedent to be performed by Symington before the title vested in him, he should have shown these conditions performed. If he was not to have title or *absolute* right of possession until he had paid for the team, it appears to us he totally fails to make a case.

He shows, taking his testimony for truth, that he had the cattle about one hundred and ninety or one hundred and ninety-five days; that his hauling for Bostwick amounted to a fraction less than one thousand one hundred dollars. From this was to be deducted all the expenses of himself and cattle, repairs to wagon, the purchase of four oxen to replace those that died, etc. One ox is stated to have cost fifty dollars; if the others cost the same, here is an item of two hundred dollars. The cattle seem to have cost for pasturage, two dollars per night, and not less than three hundred and eighty for the whole period. Besides this, hay was bought for feeding most of the time. Toll and tavern bills on the road were to be paid; shoeing cattle, repairing wagon, and the personal expenses of Symington, all come out of this one thousand one hundred dollars. The probability is that all these expenses fell little short, if they did not exceed, one thousand one hundred dollars.

It appears to us the first finding of fact is not sustained by the testimony, and the ends of justice require a new trial should be had.

Mackie *et al.* v. Lansing.

Judgment is reversed, and a new trial ordered.

LEWIS, C. J., concurring specially.

I concur in the reversal of the judgment, upon the ground that the first finding of the Court was not warranted by the evidence.

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H. MACKIE ET AL., APPELLANTS, v. J. V. A. LANSING,
RESPONDENT.

A party holding a mortgage is not barred of his right to foreclose the same until four years shall have elapsed from the accruing of the action, although the statute may have barred an action at law on the debt before that time.

A party taking a second mortgage during the period intervening between the time when the statute bars the action at law, and when it bars the proceeding to foreclose, holds his lien subject to the first mortgage.

APPEAL from the District Court of the First Judicial District, Storey County, Hon. C. BURBANK presiding.

The facts are stated in the Opinion.

Campbell & Seeley, for Appellants.

Williams & Bixler, for Respondent.

Opinion by BEATTY, J., LEWIS, C. J., concurring.

This was a suit brought on a note executed in the State of Nevada in the year 1862, secured by mortgage on real estate situated in this State (then Territory). The note, after it became due and was barred by the Statute of Limitations of the then Territory of Nevada, was renewed by a special promise in writing. But before this renewal, another and intervening mortgage had been executed by the defendant to a third party.

The Court below held that the plaintiff's note having been barred at one time by the Statute of Limitations, the security was gone, and the second mortgage took precedence.

This was an error: although the plaintiff's right to sue on the note itself may have been barred at one time, his right to foreclose the

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mortgage is not barred until the lapse of four years. (See *Henry v. Confidence Co.*, 1st Nev. State Reports, 619.) That time had not elapsed when this suit was brought. According to the finding of facts in the Court below, appellants were entitled to a precedence of lien on the undivided half of the property described in the complaint to secure their debt.

The judgment of the Court below is reversed, and the Court will enter up a decree in accordance with this opinion.

MOSES WICK, RESPONDENT, v. W. T. O'NEALE, ADM'R,
APPELLANT.

When a party dies owing a debt not barred by the Statute of Limitations at his death, the holder of the claim has one year after administration granted on the debtor's estate, within which to bring his action, although the action would have been barred in less than one year, if the debtor had lived.

This extension of the time within which the action may be brought is subject only to this qualification, that if the claim is presented to the administrator and rejected, suit must be brought thereon within three months after rejection.

This twelve months' extension applies to all classes of cases, as well those debts contracted out of the State, and which are otherwise barred by six months' limitation, as others.

APPEAL from the District Court of the First Judicial District, Storey County, Hon. R. S. MESICK presiding.

The facts are stated in the Opinion.

Mitchell & Hundley, for Appellant.

McRae & Rhodes, for Respondent.

Opinion by LEWIS, C. J., full Bench concurring.

This action is brought upon a promissory note executed by one W. O. Middleton, at Oroville, in the State of California, on the eleventh day of June, A.D. 1864, by which he obligates himself to pay the sum of five hundred dollars to the plaintiff in thirty days from the time of its execution.

By the findings of fact set out in the record it appears that, on

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28	157

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the ninth day of October, nearly three months after the maturity of the note, the maker, Middleton, died ; that, on the fourteenth day of November following, the defendant was duly appointed administrator of the deceased's estate, and on the eleventh day of July, A.D. 1865, about five months after this appointment, the note was regularly presented for allowance as a claim against Middleton's estate, and rejected by the administrator ; and within two months thereafter this action was brought, and judgment entered in favor of the plaintiff. The only defense relied on by the defendant is based upon the thirty-fourth section of the Statute of Limitations of this State, which declares that "An action upon any judgment, contract, obligation, or liability for the payment of money or damages obtained, executed, or made out of this Territory, can only be commenced within six months from the time the cause of action shall accrue." (Laws of 1862, p. 82.)

This is an amendment of section thirty-four of the general Statute of Limitations, and the defendant claims that under it the note in question is barred, and hence that no action can be maintained upon it. There is, however, another section of the Statute which clearly excepts from the operations of this section all cases where the debtor dies before the Statute has fully run. It provides that "if a person, against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his executors and administrators after the expiration of that time, and within one year after the issuing of letters testamentary or of administration." (Section 23, page 30, of the Laws of 1861.)

This section beyond all doubt extends the time for the commencement of actions to one year from the time of the issuing of letters testamentary, in all cases where the person against whom the action may be brought dies before the Statute has fully run.

In this case, the maker of the note died before the Statute had run, and the action was brought in less than one year after the defendant had been appointed administrator : hence it clearly comes within section twenty-three, above referred to. This section must, however, be construed in connection with Section 136 of the Probate Act, which makes it the duty of any person whose claim against an estate is rejected, to bring his action against the executor or ad-

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ministrator within three months after such rejection, if it be then due ; and if not, then within three months after it becomes due.

Though the creditor of the estate has one year from the time letters testamentary are issued within which to commence his action, it is always with the qualification that it is commenced within three months after the claim upon which it is based is rejected by the executor or administrator. Thus the holder of the claim has one year after the appointment of the executor or administrator within which to bring his action, unless he voluntarily shortens that time by presenting his demand at a period more than three months before the expiration of the year. To illustrate : The plaintiff in this case could, if he chose, have deferred the presentation of the note upon which the action is brought for nine months after letters were issued to the defendant, and he could then have delayed three months after its rejection before bringing suit ; thus he would have a year after the appointment of the defendant within which to bring his action, or he could have shortened that time by presenting his claim immediately upon the issuance of letters, and thereby made it necessary for him to institute his action within three months after the appointment of the defendant.

But it is claimed by counsel for appellant that the twenty-third section of the Statute of Limitations, referred to above, does not apply to that class of actions referred to in the amended section thirty-four.

Why it should not, we are utterly unable to see. Section thirty-four, as amended in the year 1862, becomes a part of the general Statute of Limitations, and section twenty-three clearly applies to all actions referred to in the Act. If it were the intention of the Legislature to except all actions accruing out of the State from the operation of section twenty-three, such an exception should have been incorporated in some part of the law. That has not been done ; we, therefore, hold that it applies to all actions, irrespective of where they may accrue.

The judgment of the Court below must be affirmed.

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31* 436/

CYNTHIA A. WILDE, RESPONDENT, v. JONATHAN S. WILDE, APPELLANT.

When the statute says an order may be made on due notice to the opposite side, it means the statutory written notice of five days, and it would not be proper to hear a motion and make the order until such notice had been given and the full five days expired.

Under the statute providing for the payment of alimony *pendente lite*, the Court cannot make an order for the payment of past expenses after the suit has been finally decided against the wife, although the motion was made before the decision of the case.

APPEAL from the District Court of the Second Judicial District, Ormsby County, Hon. S. H. WRIGHT presiding.

The facts are stated in the Opinion.

Geo. A. Nourse, Attorney General, for Appellant.

Clayton & Clarke, for Respondent.

Opinion by BEATTY, J., LEWIS, C. J., concurring.

In this case, a bill seeking a decree of divorce from her husband was filed by the plaintiff in the month of April. In the early part of May an answer was filed. On the thirtieth day of May the cause was set for trial on the eighth day of June.

On the fourth day of June, the plaintiff's attorney gave notice that on the eighth (the same day the case had been set for trial) he would move the Court for an allowance to be made the plaintiff out of her husband's estate by way of alimony *pendente lite*, and to enable her to prosecute the suit. This motion was called up at the meeting of Court on the morning of the eighth, and defendant objected to the motion being then heard, because he had not had five days' notice thereof, and had not been served with a copy of the affidavit on which the motion was based.

The Court took the motion under advisement, and directed the plaintiff to serve on defendant a memorandum of amounts claimed for the prosecution of suit, for support *pendente lite*, etc.

In the mean time the trial proceeded, and no further steps were taken with the motion (unless it was the furnishing to defendant

the memorandum of accounts claimed, which the Court had directed) until the trial terminated in a judgment for the defendant. The statute says an order for alimony in cases of this sort may be made on "due notice." We think *due notice* means such notice as is prescribed for all motions in the General Practice Act, that is, a written notice of five days, when both parties reside in the district where the motion is to be made, as in this case.

As only four days' notice was given, we think the Court could not properly have heard and determined the motion at the time it was called up, on the morning of the eighth of June, unless by consent of defendant. As this consent was not given, we think the motion was properly laid over.

In the mean time the case came on for trial, and that trial having resulted in a judgment for defendant, we are of opinion that after judgment, the Court could not proceed to determine the motion.

Alimony is granted to a wife applying for a divorce *pendente lite*, because having made a *prima facie* case by her bill, she is entitled to the means of establishing that case on trial if it can be done.

Usually a case cannot be brought to trial without money. Therefore the law has provided in the case of married women, whose property is generally entirely under the control of the husband, that he shall furnish her out of the common property with sufficient means to carry on the suit and determine whether she is entitled to the relief sought in her bill. If this were not done, there might be a total failure of justice, for a tyrannical husband might abuse his wife to any extent and protect himself from the consequences the law visits on such conduct, by denying her the means of asserting her rights in a Court of Justice. But if it could be known beforehand that the wife had no just cause of action, the law would not compel the husband to pay the costs of a groundless suit brought against himself. So after it has been determined by the judgment of the Court that it was a groundless action, it would not be proper to make an order for past costs and expenses of such action. Paying the costs after the suit was over and decided could not alter the judgment.

In a proper case, where there was a motion for a new trial pending, or even an appeal pending, the Court below might, in its discretion, allow alimony to enable the wife to prosecute the case to

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final hearing. But when the controversy is entirely ended by a judgment for the husband, who is defendant, it is an error to make an order for past costs and expenses. (See Sections 416 and 417 of Bishop on Marriage and Divorce.)

It is urged that this Court has no jurisdiction in this case because the amount ordered to be paid is less than three hundred dollars. This Court has jurisdiction in all Chancery cases, whatever may be the amount in controversy. This comes within the jurisdiction of this Court. The order complained of was made after judgment, and is therefore an appealable order under the statute.

The order directing the defendant Jonathan L. Wilde to pay one hundred and ninety-three dollars and seventy-five cents into Court is hereby reversed and set aside, and the Court below will make an order to that effect in its minutes.

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W. M. SEAWELL, RESPONDENT, v. D. COHN, APPELLANT.

A sues B, and attaches his goods. C, for the purpose of releasing the goods, entered into a bond conditioned to pay to plaintiff, on demand, any judgment he may recover against B. The attorneys of A and B adjust the amount due from B to A, and enter into a written stipulation that judgment may be entered up in Court in favor of A for the amount due, with a promise that if B pays half the amount in thirty days, he may have sixty days to pay the balance. The judgment is entered up for the amount found due to A, but there is no order of Court in regard to staying execution either for thirty or sixty days. *Held*, this arrangement did not discharge the surety on the bond given to release the property attached.

APPEAL from a judgment of the District Court of the Ninth Judicial District, Esmeralda County, Hon. S. H. CHASE presiding.

The facts are stated in the Opinion.

J. H. Hardy and *Boring & Brown*, for Appellant.

The appellant was only a surety or guarantor. The bond given should be held merely as a statutory undertaking to release property under attachment. (Parsons on Contracts, Vol. II, pp. 67-8; *McWilliams v. Dana*, 18 Cal. 339.)

W. M. Seawell, for Respondent.

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The answer does not show that the execution was stayed by the stipulation between attorneys entered into when judgment was rendered. The fact, not being stated in the answer, cannot otherwise be made available. (See *Bartlett v. Crozier*, 17 John. 457, and *Barrow v. Frink*, California case not yet reported.)

The bond was an original and not collateral undertaking. (*Palmer v. Vance*, 13 Cal. 553 and 558; *Tissot v. Darling*, 9 Cal. 278; *Aud v. Magruder*, 10 Cal. 282; *Parsons on Contracts*, Vol. II, page 69.)

Opinion by BEATTY, J., full Bench concurring.

In the spring of 1864, J. A. Brimhall brought suit against the Durand Mill & Mining Company for \$850, and sued out a writ of attachment, which was levied on the goods of defendant.

To procure the release of these goods, D. Cohn and Solomon Ashim executed an undertaking which, after reciting the attachment, etc., concludes as follows :

"Now, therefore, we, the undersigned, do hereby undertake, jointly and severally, in the sum of one thousand dollars, to the effect that we will, on demand, pay to the plaintiff the amount of any judgment that may be recovered in favor of said plaintiff in above action and costs of suit—not exceeding the said sum of one thousand dollars (\$1,000).

"Sealed with our seals.

"Dated this 23d day of April, A.D. 1864.

"D. COHN, [Seal]

"SOLOMON ASHIM, [Seal]."

In the month of July, 1864, judgment was rendered in favor of Brimhall for seven hundred and fifty-one dollars and costs of suit. This judgment was never satisfied, and Brimhall assigned the undertaking, which was given for release of goods attached, to the present plaintiff, who instituted this action.

The defense made to the action is, that Brimhall, after Cohn and Ashim had executed the undertaking, extended the time of payment to the Durand Mill & Mining Company without consulting them.

The portion of the answer setting up this defense, so far as it re-

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lates to extension of time, and which it is material to notice, is as follows :

That, on the 5th day of July, 1864, and subsequent to the execution of said undertaking, the said J. A. Brimhall, for a valuable consideration, made and entered into a stipulation with said Durand Mill & Mining Company, extending the time of payment of the judgment in said action sixty days, of which the following is a copy :

“ In the District Court of the Second Judicial District, Esmeralda County, Nevada Territory.—*J. A. Brimhall*, plaintiff, v. *Durand Mill & Mining Company*, defendant. It is hereby stipulated and agreed by and between the above named plaintiff and the above named defendant, that plaintiff do have and recover judgment against said defendant in this action, for the sum of seven hundred and fifty-one dollars, and costs of suit ; and that said judgment specify that the whole amount thereof be paid in United States gold coin.

“ It is further agreed by said plaintiff, that plaintiff will stay execution upon said judgment for sixty (60) days from the date hereof ; provided, that the defendant will, within thirty (30) days from this date, pay to plaintiff the one-half of the amount of said judgment.

“ T. M. PAWLING,

“ Attorney for Defendant.

“ W. M. SEAWELL,

“ Attorney for Plaintiff.

“ Aurora, July 5, 1864.”

This answer was demurred to and the demurrer sustained. The defendant declined to answer further, and judgment was rendered for plaintiff. The defendant appeals, and the only question raised is, whether the execution of this instrument by the attorneys in the case of *J. A. Brimhall v. The Durand Mill & Mining Company* operated as a release of Cohn & Ashim.

Appellant relies on the general proposition that extension of time to a principal without the assent of his surety exonerates the surety.

It has been frequently held in the case of guarantors of promissory notes that where the payee extends the time of payment, and so binds himself by a legal and valid contract that he cannot proceed to the collection of the note until the expiration of the time

mentioned in the new contract, this releases the guarantor, unless he has either expressly or by implication sanctioned the new contract for extension of time.

But whether the obligors in a bond given for the release of goods seized under attachment would stand in the same position, is not so well settled. These obligations are direct and positive obligations (at least such is the form of this undertaking) to pay any judgment that may be rendered against the party whose goods have been attached. Upon the rendition of the judgment, the parties to the undertaking might undoubtedly pay the same, and take steps against the judgment debtor, without any regard to any stipulations he may have made with the judgment creditor.

This would seem to be the view of a similar case taken by the Supreme Court of California. (See *Palmer et al. v. Vance et al.*, 13 Cal. 553.)

On the other hand, we think, from the language used by Chief Justice Shaw, in delivering the opinion in the case of *Fulham v. Valentine*, (11 Pickering, 156) that he was perhaps of a contrary opinion.

But, whatever may be the rule in a case where the extension of time is made obligatory on the creditor, we do not think this case comes within the rule. The answer shows the signing of a certain agreement by the attorneys in the case, but this did not of itself operate necessarily as a stay of execution, for two reasons: First, the agreement is to stay the execution for sixty days, "provided, the defendant will, within thirty (30) days from this date, pay to the plaintiff the one-half of the amount of the said judgment."

Here there is an agreement to stay execution for sixty days "provided" something else is done within thirty days. There is no allegation that this other thing was done within the thirty days.

Then, clearly, it does not appear plaintiff was bound to stay the execution for sixty days. Nor do we think he was even bound to stay it for thirty days. There is nothing to that effect in the agreement. As we interpret this instrument, it was in the discretion of plaintiff at any time to issue his execution, until the half of the debt was paid. If half the debt had been paid, then the defendants might have claimed the benefit of this contract. If paid before the issuance of execution, they might well have claimed that none should

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be issued until the expiration of the sixty days after judgment. If paid after the issuance of the execution, the plaintiff would probably have been, at least morally, if not legally, bound to suspend any action under the execution until after the expiration of the stipulated period. We think, then, that the agreement itself did not amount to an absolute extension of time.

But there is another objection to this agreement. It was an agreement made in the progress of the trial by the attorneys.

Such agreements are proper enough in themselves, but if they are to affect the parties to the suit after the judgment is rendered, it seems to us they should be filed in the case, (there is no evidence this ever was filed) and enforced by the judgment or order of the Court. When parties agree, either by themselves or their attorneys, that a certain judgment shall be entered up, and that no execution is to be issued for a certain time on that judgment, the terms of that agreement should be incorporated in the judgment, or else in a separate and distinct order of Court. Otherwise, we see nothing to prevent a party from violating such agreements. In this case, suppose the defendants had paid half the judgment immediately after its rendition, and the plaintiff the very next day had demanded execution for the balance, we see no way he could have been prevented from getting it. The clerk could not take notice of this paper, signed by the attorneys, but neither filed nor made the subject of any order of Court. He must issue the execution when demanded. Possibly the Court might in such a case, on proper application, stay the execution for the sixty days, but we would doubt the propriety of going behind the judgment even by the Court.

We refer to the case in 11 Pickering, just cited, for the effect and operation of such agreements when not acted on by the Court.

The judgment of the Court below must be affirmed, and it is so ordered.

Maynard v. Railey et al.

G. H. MAYNARD *v.* ISAAC RAILEY ET AL., UPON A
WRIT OF CERTIORARI.

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12	175
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Upon a return to a writ of certiorari, this Court can only inquire whether the tribunal certifying its proceedings has, or not, exceeded its jurisdiction.

The District Court has the power to appoint a receiver on an *ex parte* application, when a proper showing is made, as in this case.

The Court will appoint a receiver when one partner excludes his copartner from a participation in the affairs of the partnership. So, too, when both partners have assigned their respective interests, and the assignees cannot agree.

When suit is brought and summons issued, the Court has power to appoint a receiver before the summons is served on defendants. But the appointment of a receiver ought not to be made without notice, except in cases of emergency.

THIS was a writ of certiorari issued from this Court upon the petition of Thomas H. Williams *et al.*, defendants in the suit of H. G. Maynard against Isaac Railey *et al.*, to the District Court of the Second Judicial District, requiring that Court to show by what authority certain orders were made in relation to the appointment of a receiver, and the taking possession of certain property.

Williams & Bixler, for Petitioners.

This writ will be issued when an inferior Court has exceeded its jurisdiction, and there is no adequate remedy by appeal, or when such Court has not regularly pursued its authority. 2d Bacon's Abridgment, "Certiorari."

A suit is not commenced before the summons is issued. This order was made before suit commenced, and therefore without authority. (See Edwards on Receivers, page 13.)

Property cannot be seized except upon due process of law, and after hearing.

Defendants Williams & Frankenthal were in possession of the property, and within the jurisdiction of the Court. No order depriving them of their property could be made without notice. (Edw. on Receivers, pages 14 and 15.)

The plaintiff only claims that he is tenant in common with defendants. The utmost the Court could do would be to appoint a receiver to collect his share of the rents.

Geo. A. Nourse and R. M. Clarke, for Respondents.

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The question here is not whether the Court below erred in appointing a receiver, but whether it exceeded its jurisdiction. The District Court certainly had jurisdiction of the subject matter (a suit in equity) and of the parties in this action. Courts of Equity have the power to appoint receivers. How has the Court exceeded its jurisdiction? Such orders are constantly made by Courts of Equity. (See 3d Pier Williams 379, cited in Edwards on Receivers, 12.)

The bringing of the suit gave the Court jurisdiction. (*Ex parte Cohen*, 6 Cal. 320; *Prader v. Purkett*, 13 Cal. 591.)

In all cases of emergency (and of this the Court below is the judge) Courts of Equity appoint receivers before answer is made. (*Gibson & Harris, v. Martin*, 8 Paige, 481; *Vann v. Barnett*, 2d Brown's C. C. 157; *Middleton v. Dodswell*, 13 Vesey, 266; *Lloyd v. Passingham*, 16 Vesey, 59; *Scott v. Beecher*, 4 Price, 346; *Bloodgood v. Clark*, 4 Paige, 574; *Duckworth v. Trafford*, 13 Vesey, 283.)

Opinion by LEWIS, C. J., full Bench concurring.

This case comes before this Court upon a writ of *certiorari* issued to the District Court of the County of Ormsby, the defendants claiming that the Court below had exceeded its jurisdiction in the appointment of a receiver of certain property and business in which all the parties to the action seem to claim some interest.

Section 403 of the Civil Practice Act of this State, provides that "this writ may be granted on application by any Court of this State, except a Justice's Court, in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor in the judgment of the Court any other plain, speedy and adequate remedy;" and Section 409 of the same Act declares that "the review upon the writ shall not be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer." Evidently, the only question which can properly be inquired into upon this writ, is that of jurisdiction.

If it appear that the jurisdiction of such tribunal, board, or officer has not been exceeded, there is no foundation for the writ.

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The expression employed in the latter section above quoted, that the inquiry shall extend no further than to determine whether the inferior tribunal "*has regularly pursued its authority,*" certainly does not authorize an inquiry into any irregularity or question beyond that of jurisdiction. If the issuance of the writ is only permitted when an inferior tribunal, board, or officer has exceeded his or its jurisdiction, it is clear that no other question but that of jurisdiction can be inquired into upon its return. A mere irregularity, however gross it may be, cannot properly be the subject of inquiry upon it. Hence, we will confine our considerations to the question of jurisdiction simply.

Section 143 of the Practice Act, which reads as follows, expressly gives the District Court the power to appoint a receiver in certain cases: "A receiver may be appointed by the Court in which the action is pending, or by a Judge thereof. First, before judgment, provisionally, on the application of either party when he establishes a *prima facie* right to the property, or to an interest in the property which is the subject of the action, and which is in possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired. Secondly, after judgment, to dispose of the property according to the judgment or to preserve it during the pendency of an appeal; and thirdly, in such other cases as are in accordance with the practice of Courts of Equity jurisdiction."

This section, it seems to us, settles the question of the power of the Court to appoint a receiver in proper cases, and the complaint as clearly makes out a case in which the relief claimed by the plaintiff could not properly be refused. The bill or complaint contains substantially the following allegations: That in the month of July, A.D. 1864, the defendant Isaac Railey, and one J. Neely Johnson, both of the County of Ormsby and State of Nevada, formed and entered into a copartnership for the purpose of erecting a quartz mill in said county for crushing and reducing gold and silver-bearing rock, and extracting therefrom the precious metals; that the copartnership thus formed transacted their business under the firm name of Johnson & Railey; that two hundred acres of land which were necessary to the convenient working of the quartz mill were purchased, and the mill erected thereon; that the co-

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partnership thus formed carried on the business of crushing and reducing gold and silver ores, from the twenty-second day of August, A.D. 1864, to the sixth day of March, A.D. 1865; that during this period, the defendant Railey managed and controlled the entire business of the concern, which was very profitable, and that during that time he received as profits therefrom at least the sum of thirty thousand dollars; that out of such profits, Johnson had not received over six hundred dollars, although he was entitled to one-half of the net profits of the business; that in the month of March, A.D. 1866, the defendant Railey ousted Johnson from the possession of the mill, land, and all other property of the firm, and deprived him of all participation in the management of their property and business, and has ever since deprived him of all such control, and has ever since appropriated all the profits of the business to his own use; that in the month of September, A.D. 1866, Johnson, by his deed bearing date of that day, granted, bargained, sold and conveyed to the plaintiff in this action all his right, title and interest in and to the said land, mill, and all other personal property belonging to the firm of Johnson & Railey, together with all rights and claims of whatever description held or owned by him against the defendant Railey arising out of the business transactions of the partnership; that on the seventh day of August, A.D. 1866, Railey absconded from the State of Nevada, leaving the defendants Frankenthal and Williams in possession of all the property, real, personal and mixed, belonging to the said partnership; that Railey is and was at the time of his absconding, insolvent and totally irresponsible, and that Frankenthal and Williams are also insolvent and irresponsible; that on the fourth day of October, A.D. 1866, the plaintiff demanded of the defendants Frankenthal and Williams, who were in possession of the property under Railey, to be let into possession thereof, but that they refused to give him such possession; that the use of the mill is *reasonably* worth the sum of twenty-five hundred dollars per month, and that owing to the insolvency of Railey, Frankenthal and Williams, the plaintiff is in danger of losing all the profits from the business of the firm, and all the rents of the mill and other property.

Upon a sworn complaint containing these allegations, the Court below made an order appointing one Thomas G. Taylor receiver of

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all the property of the firm of Johnson & Railey, and all the rents, issues, and profits thereof, and upon the refusal of the parties in possession to surrender the possession and control of the property to the receiver, the Court made an order directing the Sheriff of the County of Ormsby to place him in possession thereof. A stronger case for the interposition of a Court of Equity by the appointment of a receiver could hardly be made out.

In partnership cases where all the partners have an equal right, not only in the conduct of business, but also in its settlement after dissolution, a failure to agree among themselves, or the refusal of one partner to allow the other to participate either in conducting or the settlement of the business, obviously presents a case for the appointment of a disinterested party under the direction of the Court to close up the business and protect the property. When the conduct of one partner is incompatible with the relations of the copartnership, and is likely to result in loss or injury to any of his copartners, it has been the invariable practice of Courts of Equity, upon the application of any of the partners, to dissolve the partnership and appoint a receiver. "Where," says Mr. Edwards, "either partner has a right to dissolve the partnership, and the agreement between the parties makes no provision for closing up the concern, it is a matter of course to appoint a manager or receiver on a bill filed for that purpose, if they cannot arrange the matter between themselves." (Edwards on Receivers, 309.) A receiver will be appointed to settle up the business when it is shown that the surviving partner is insolvent, dishonest, or is not a fit person to close up the affairs of the partnership. (Id.)

Where two members of a partnership obtained a renewed lease of the partnership premises, and the administratrix of a deceased partner showed a *prima facie* title to participate in the benefits of it, a receiver was appointed to protect the property until the rights of the parties could be determined. (Id. page 310.) So upon a bill filed by the assignees of a bankrupt partner against the solvent partners, praying for the sale of the partnership effects, a division of the proceeds, and for a receiver, Lord Eldon decreed according to the prayer of the bill. "The consequence is," said his Lordship, "that the assignees of the bankrupt partner are become *quoad*, his interest tenants in common with the solvent partners ;

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and the Court must then apply the principle upon which it proceeds in all cases where some members of a partnership seek to exclude others from that share to which they are entitled, either in carrying on the concern, or in winding it up when it becomes necessary to sell the property, with all the advantages relative to good will, etc." The case of *Phillips v. Atkinson* (2 Brown's Ch. Cases, 272) seems to be directly in point here. In that case the plaintiff's and defendant's testators had been partners. A bill was filed for an account and the appointment of a receiver. The defendant opposed the appointment of a receiver as an imputation upon his character, insisting that he was a proper person to receive. Lord Kenyon, in delivering the opinion, said: "It was not at all so; that where there was a copartnership there is a confidence between the parties, and if the one dies, the confidence in the other partner remains, and he shall receive; but when both are dead, there is no confidence between the representatives, and therefore the Court will appoint a receiver." In the case under consideration, although neither of the partners are dead, yet their respective interests, having passed to third parties, the reason for appointing a receiver is the same in this case as in that of *Phillips v. Atkinson*. A receiver will also be appointed where any of the partners seek to exclude another from taking that part in the concern which he is entitled to have, whether such attempt to exclude occurs during the continuance of the partnership, or after its dissolution, and during the closing up of the business. (Edwards on Receivers, 329, and cases there cited.) Upon this point Lord Eldon, in the case of *Court v. Harris*, (1 Turn. and Reess, 496) says: "The most prominent point in which the Court acts in appointing a receiver of a partnership concern, is the circumstance of one partner having taken upon himself the power to exclude another partner from as full a share in the management of the partnership as he who assumes that power himself enjoys." In the case of *Williams v. Wilson*, (4 Sandford's Ch. R. sec. 79) where it appeared that a partnership, which had been formed for the purpose of conducting an insane hospital and immigrant lazaretto, was broken up by cross suits and disagreements among the partners, the Court allowed a receiver, with directions to sell immediately the lease of the premises occupied, and the movables and good will of the premises. Chancellor Walworth, in de-

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livering the opinion of the Court in the case of *Martin v. Van Schnick*, (4 Paige Ch. R. 479) uses the following language :

“ Each partner has an equal right in this case to the possession and control of the partnership effects and business, and if they cannot agree among themselves, it is a matter of course to appoint a receiver upon a bill filed to close the partnership concerns on the application of either party.”

These authorities clearly sustain the plaintiff's right to the appointment of a receiver upon the case made out in his complaint. Hence we have shown that the Court below not only had the power to appoint a receiver, but that the case made out by the bill fully warranted the exercise of that power. But it is claimed the Court had no jurisdiction to appoint a receiver at the time it did, because summons had not been served on the defendants, and no notice of the application given to them. An action had, however, been commenced, and summons had been issued when the receiver was appointed by the Court, and it had full jurisdiction of the subject matter. The very reason why a Court of Equity interposes in cases of this character is to prevent the mischiefs which might result from the tardy remedy of the Courts of law. It is a familiar rule that equity will always lend its aid where the remedy in the Courts of law is not adequate, or the delay in obtaining it is likely to result in injury or damage to the party seeking its aid. If a Court of Equity could make no order of the character made in this case until the service of summons on the parties to be affected by it, or until it was shown that they were purposely avoiding its service, equity would be shorn of half its efficacy. Many of the summary remedies which it affords are merely preventive, employed for the purpose of protecting a party from a threatened injury, but which, in many cases, would be utterly nugatory if the Court were not permitted to employ it until after the summons or notice. If the parties to be affected by the appointment of a receiver were beyond the jurisdiction of the Court, so that service of the summons could only be obtained by means of its publication, all the property sought to be protected by his appointment might possibly be wasted or destroyed, and the Court would thereby fail to grant that protection or relief which, by the clearest principles of justice, ought to be awarded. The power exercised by the Court in the appoint-

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ment of a receiver upon an *ex parte* application, as was done in this case, is analogous to that exercised in granting a restraining order or temporary injunction. It is not unusual for the Courts to grant a restraining order upon *ex parte* application at the time of the issuance of the summons and before it is served, and yet in many cases such an order would as effectually deprive a person of the full enjoyment of his property as the appointment of a receiver ; and we have never heard it claimed that before such order could be made, summons must first be served on the person to be enjoined, or that if it were made before the service of summons, he was being deprived of his property without due process of law. As suit had been commenced, summons issued, and the Court had jurisdiction of the subject matter, we do not think it exceeded its jurisdiction in appointing a receiver. However, as the bill does not exhibit any great and pressing necessity for an immediate appointment of a receiver without notice to the defendant, the Court did not exercise that caution which should be observed in making orders of this character. Such an error cannot, however, be corrected upon this proceeding.

A receiver should not be appointed *ex parte* except in cases where it is clearly shown that the delay which would result from the giving of notice would defeat the rights of the complainant, or result in great injury to him. Cases may unquestionably arise where an immediate and *ex parte* appointment of a receiver would be necessary to afford the plaintiff that protection to which he may be justly entitled. This case does not, however, present any such pressing necessity, and we think notice should have been given ; yet as the order has been made, it should be allowed to stand until the defendant show cause why it should be set aside.

The order of the Court below is affirmed.

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STATE OF NEVADA, APPELLANT, *v.* WILLIAM SALGE,
RESPONDENT.

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There is no statute requiring a District Attorney to sign an indictment. But even if his signature is necessary, still if that officer does sign it, and instead of signing "H., District Attorney of Douglas County," signs "H., Prosecuting Attorney of the 8th Judicial District (Douglas County composing that District) it is well.

When a prisoner has pleaded "not guilty," it is in the discretion of the Court whether, or not, to allow him to withdraw that plea to interpose another.

The prisoner has, however, an absolute right to withdraw that plea to interpose any good defense which has arisen since the last continuance of the case.

The Court properly refused to allow defendant to withdraw his plea of "not guilty," to interpose a plea that was not sufficient in law as a defense, and besides being defective in form, could not by amendment be made available.

When a prisoner makes out a proper case for continuance, on account of the absence of a material witness, it is error to compel him to go to trial on the admission of the District Attorney that the witness, if present, would swear to the facts as stated by defendant.

Although the prisoner may not have made out a very clear case for a continuance, still if the Court below was of opinion that injustice was done the prisoner because of the absence of his witness, the Court was justified in granting a new trial.

When an order is made excluding defendant's witness from the court room, so that neither witness shall hear the others testify, and some of the witnesses come in during the trial, this may discredit such witnesses, and subject them to punishment for contempt. But the defendant himself not being in fault, is entitled to their testimony.

APPEAL from an order granting a new trial in the District Court of the Second Judicial District, Ormsby County, Hon. R. S. MESICK, Judge of the First Judicial District, presiding.

The facts are stated in the Opinion of the Court.

Thomas E. Haydon, for Appellant.

This Appeal is authorized by Statutes of 1861, p. 486, sec. 469.

It is in the discretion of the Court to exclude a witness from testifying, who has improperly, and in violation of the order of the Court, come in whilst other witnesses are testifying. (1 Greenleaf on Ev. 432; 3 Starkie on Ev. 1733, and notes G. and H.; 1 Phillips' Ev. 268, notes and references; Part 1, Cowen & Hills'

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notes to Phillips on Ev. note 501, page 720 ; 1 Arch. Crim. Prac. and Pleading, 167 and note 2 ; 2 Roscoe's Crim. Ev. 163.)

It is only necessary, to avoid a continuance, to admit that the absent witness will swear to the facts set out in the affidavit. It is not necessary to admit such facts are true. (2d edition Wharton, 835 ; 9 Pick. 575.)

These errors, if they were errors, were insufficient to authorize a new trial. (Stat. of 1861, sec. 428, page 421.)

The affidavit for continuance was insufficient, the witnesses being out of the jurisdiction. (2 Ala. 320 ; 1 Ala. 275 ; 1 Howard, [Miss.] 100 ; 6 Smead & Marshall, 451.)

Their testimony was cumulative, and there was no probability of procuring their attendance at a subsequent term of the Court. (Wharton Criminal Law, 2d edition, page 832 and notes ; *Com. v. Millard*, 1 Mass. 6, and note ; 1 Archbold's Crim. Prac. and Pleading.)

J. Neely Johnson, J. J. Musser, and R. M. Clarke, for Respondent.

Opinion by BEATTY, J., full Bench concurring.

Wm. Salge was indicted for grand larceny. He was first tried and convicted and sentenced in Douglas County, where the offense was alleged to have been committed. That judgment was reversed, and the defendant obtained a change of venue to Ormsby County. He was again put on his trial, and the jury again found him guilty. The Court before which he was tried made an order granting him a new trial, and the State appeals from that order.

The new trial was applied for on various grounds of alleged error committed by the Court during the progress of the trial. The Judge seems to have thought he did err in some one or more of the points alleged to have been error.

The appellant now takes on itself to show that the Court did not err in the progress of the trial ; that the only error was in supposing and acting upon the proposition that some error had before that time been committed.

This leads us to the necessity of examining *seriatim* the errors alleged to have been committed in the progress of the trial.

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By consent of parties, on the eleventh day of June, 1866, the trial was set for the twenty-seventh of that month, with the express understanding when the case was set, that the defendant in agreeing to set the trial for that day, should not be considered as having waived any right "to object to the indictment by motion, demurrer, plea or otherwise." On the twenty-ninth of June, the case came on in its order for trial, and defendant asked leave to withdraw his plea of not guilty, which had been entered prior to the trial in Douglas County. The Court refused to allow the withdrawal of the plea unless upon good cause shown. The defendant then moved for leave to file motion to quash indictment. This the Court also refused unless some good cause were shown for so doing. The defendant then presented to the Court a written motion to quash the indictment because it was signed by the "Prosecuting Attorney of the Eighth Judicial District," an officer unknown to the law. The Court ruled that the written paper contained no good ground for quashing the indictment, and refused to let it be filed.

Respondent contends that the indictment was defective; that it should have been signed by the "District Attorney of Douglas County," and not being so signed the Court should have allowed the motion to be filed, and should thereon have quashed the indictment.

We know of no law which requires an indictment to be signed. Section 234 of the Criminal Practice Act states what the indictment shall contain. Section 235 gives the form of an indictment. Section 243 states that an indictment shall be sufficient when certain things can be understood therefrom. Among other things, "That it was found by a Grand Jury of the District in which the Court was held."

But in none of these sections is anything said about the indictment being signed by the District Attorney. Hence we are inclined to think it is not at all necessary that an indictment should be signed by the District Attorney. But even if such signature were necessary, we think in this case the signature was not defective. This Court and all other Courts must take judicial notice of the laws of the State. We know that Douglas County, and that county alone, composed the Eighth Judicial District of the State of

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Nevada when this indictment was found. We also know that District Attorney and Prosecuting Attorney are synonymous terms.

The Constitution calls this officer District Attorney. But the law prescribing the duties of these officers says they shall be "public prosecutors" in their respective counties. (See Laws of 1864-5, p. 387.) In another law of the same Legislature (see pp. 163-4) the terms District Attorney and Prosecuting Attorney are used to designate the same officer.

The term, then, District Attorney or Prosecuting Attorney of Douglas County would be one and the same thing. So Prosecuting Attorney of the Eighth Judicial District of Nevada is the same thing precisely as Prosecuting Attorney of Douglas County, because Douglas County constitutes the Eighth Judicial District.

The defendant then asked leave to withdraw his former plea of not guilty and file a plea of former conviction. That plea was offered to the Court, and set out the facts of the former trial, conviction and sentence in Douglas County, and that the defendant had been for a short period confined in the State Prison under the judgment based on the conviction in Douglas County.

It is well settled that, where a prisoner has pleaded not guilty, it is in the discretion of a Court whether or not to allow him to withdraw that plea to interpose another and different plea. (See 1st Chitty's Criminal Law, 436.)

There is, however, this qualification to that rule, if the defendant wishes to plead something which would be a good defense, and which has taken place since the last continuance of the cause, then he has an absolute right to do so. The Court could not deprive a party for instance of the right to plead a pardon which had been granted since the last continuance of the case.

In this case the Court had a right to refuse to let the prisoner withdraw his plea of not guilty. But at the same time, if a *good plea of autre fois acquit since the last continuance* was interposed by the defendant, the Court must properly dispose of that before proceeding with the trial of the issue, guilty or not guilty.

But in this case we think the plea was not a good one, because it is not averred that there had been a prior *lawful* conviction. The plea is informal, and therefore the Court had a right to disregard it and proceed with the trial on the plea of not guilty. Had

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this been a real *bona fide* plea, and only defective in form, doubtless it would have been more consonant with justice for the Court itself to have suggested the amendment in form necessary to make it an available defense. But in this case it was a mere attempt to plead a judgment of the District Court of Douglas County, which had been reversed by this Court, and consequently was no bar to any future prosecution or proceeding on the same indictment. The Court was right in disregarding this plea and proceeding to trial.

After these preliminary motions were disposed of, the defendant filed an affidavit, and thereupon moved for a continuance on account of the absence of material witnesses. The Court ruled that a continuance would be granted unless the State would admit that the absent witnesses, if present, would swear to the facts as alleged in the affidavit. Upon the State making this admission, the defendant was forced to go to trial without his witnesses. Respondent now contends, and we think rightfully, that if he made out a case for continuance, it was error to compel him to go to trial on such admissions. An admission that if a witness were present he would swear to certain facts is not calculated to have the same effect as if a respectable witness were present in Court, swearing to the same state of facts. We think that where a defendant makes out a clear case for a continuance, owing to the absence of a witness, and shows that he is likely to obtain the testimony of that witness by the next term of the Court, he is entitled to the continuance, notwithstanding the State may be willing to admit that the witness, if present, would swear as claimed by the defendant.

In this case the defendant's affidavit did not, perhaps, make out a very clear case for a continuance. The Court might, in its discretion, perhaps, have either granted or refused a continuance, even without imposing any conditions on the State. The conditions, if they did not benefit the defendant, certainly did him no harm. Upon this branch of the case we think it was very much in the discretion of the Judge of the Court below, whether he should or should not grant a new trial. If, from all the circumstances as developed on the trial, the Court was satisfied that injustice was done to defendant in not allowing him further time to procure his witnesses, and there was any probability that their presence might

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have varied the result, then we think the Court would, on this ground, have been justifiable in granting a new trial.

There was, however, one other point in which we think the Court erred during the progress of the trial, and which must sustain the action of the Court in granting a new trial. The defendant, at the commencement of the trial, asked the Court to place the witnesses of the State under rule, so that no one witness might hear another giving his testimony. This was done; and upon the request of the District Attorney the defendant's witnesses were placed under a similar rule. During the trial some of the defendant's witnesses came in and heard a part of the testimony for defense, and for this reason were afterwards excluded from testifying. The record does not show how much of the evidence they heard, whether their presence was accidental, and a mere oversight in the witnesses, or whether it was a deliberate disobedience of the order of the Court. Nor does the record show that the defendant himself was at all blamable for their presence. Being a prisoner at the bar, on trial, it is hardly presumable the defendant could have controlled the witnesses. No misconduct on their part (in which the defendant did not participate) could deprive the prisoner of his right to have the testimony. If the witnesses willfully disobeyed the orders of the Court, they laid themselves liable to punishment for contempt, and threw suspicion on their testimony, but did not affect the defendant's right to have the benefit of their testimony as far as it was worth anything.

The order of the Court granting a new trial is sustained, and the Court below will proceed with the further trial of the case.

W. H. GALLAGHER, APPELLANT, v. WM. DUNLAP,
RESPONDENT.

When a complaint charges a sale and delivery of goods, it is not sufficient for defendant in his answer, to say he never "had or requested" any goods of plaintiff. There must be a direct and not argumentative denial of the sale and delivery.

IN RESPONSE TO PETITION FOR RE-HEARING.

When an answer is put in defective only in form, plaintiff should demur, and not move for judgment on the pleadings. He cannot, by moving for judgment on the pleadings, deprive defendant of the right to amend.

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It is not right to compel the unsuccessful party in this Court to pay the costs of appeal as a condition precedent to making his defense in the Court below.

APPEAL from a Judgment of the District Court of the Ninth Judicial District, Esmeralda County, Hon. S. H. CHASE presiding.

The facts are stated in the Opinion.

Thos. H. Williams & W. M. Seawell, for Appellant.

A denial that defendant ever had or requested certain goods of plaintiff is not a denial of the sale and delivery of such goods to defendant. (Abbott's Pleadings, N. Y. Code, page 79 ; 4th Howard's Practice Reports, page 98.)

Boring & Brown, for Respondent.

Opinion by LEWIS, C. J., full Bench concurring.

The plaintiff, by his complaint in this action, alleges that on the 1st day of June, A.D. 1865, he sold and delivered to the defendant certain goods, wares and merchandise, consisting of "divers tons of gold and silver-bearing quartz rock and ore," of the value of five hundred and ten dollars, for which the defendant promised and undertook to pay, etc. After denying the indebtedness in regular form, the allegation of a sale and delivery is met by the defendant in his answer in the following manner :

"And further denies that he ever had or requested of said plaintiff any goods, wares and merchandise of any kind or nature whatever, and more particularly divers tons of gold and silver-bearing quartz rock and ore," at the place laid in the complaint.

Upon proper notice, the plaintiff moved for judgment on the pleadings, claiming that the answer did not sufficiently deny the material allegations of the complaint.

The Court below overruled the motion and called the case for trial. As the plaintiff refused to try the case upon its merits, the Court dismissed the complaint and rendered judgment in favor of the defendant for costs. From this judgment, and the order of the Court overruling his motion for judgment, the plaintiff appeals.

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We are satisfied that the denial in the answer is not sufficient, and as the defendant refused to amend when the opportunity was extended to him by the Court below, judgment for the plaintiff should have been granted. There is no sufficient denial of the sale and delivery of the rock in the answer. The defendant simply alleges that he never *had* the property which the plaintiff alleges was sold and delivered to him. If the defendant never *had* the property the inference of course is that it was not delivered to him. It is, however, nothing but an *inference*. This form of denial or pleading is argumentative, and therefore not good. It is not a direct denial of the allegations of the complaint, but only the statement of a fact which is incompatible with the truth of such allegations, which is in fact no denial at all, and has always been held insufficient.

"We have already seen," says Mr. Chitty, "that pleading is a statement of facts, and not a statement of argument; it is therefore a rule that a plea should be direct and positive, and advance its position of fact in an absolute form, and not by way of rehearsal, reasoning, or argument." (1 Chitty on Pleading, 539; Stephen on Pleading, 382.)

Where, therefore, in an action of trespass for taking and carrying away the plaintiff's goods, the defendant pleaded that the plaintiff never had any goods, the Court said, "This is an infallible argument that the defendant is not guilty, and yet it is no plea." (Stephen on Pleading, 384.) This rule is also recognized under the modern practice. (1 Van Santvord's Pleadings, 533.)

We are not prepared to say that under the present liberal rules of pleading, the extreme strictures of the old rule upon this point should be followed. Where, however, as in this case, there is some appearance of evasion, and even the inference to be drawn from the allegation of the answer is not by any means *absolutely* incompatible with the truth of the allegations of the complaint, we are compelled to hold that the denial in the answer is insufficient. It is possible that there was legally and technically a sale and delivery to the defendant of the property mentioned in the complaint, and yet using the word in its popular signification he might be able to swear that he never *had* the rock and ore alleged to have been delivered to him. Hence, it is not such a direct and specific denial

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as the law requires of a pleader, and in fact amounts to no denial at all.

The judgment of the Court below must be reversed. The Court will give the defendant a certain time within which to amend his answer, and if he neglects or refuses to do so, judgment must be granted in favor of the plaintiff.

RESPONSE TO PETITION FOR RE-HEARING.

Opinion by BEATTY, J., full Bench concurring.

In this case the Court rendered a decision reversing the judgment of the Court below. The appellant, in whose favor the case was decided by this Court, now asks for a re-hearing in order to obtain a modification of the order made by this Court on reversing the judgment.

Whilst the present order, after reversing the judgment in the Court below, directs that defendant shall be allowed to amend his answer, the appellant seeks to have the order made directing the Court below to enter judgment for plaintiff on the pleadings. We see no reason for this. The regular practice, when a defendant puts in a defective answer, would be to demur to that answer. If the demurrer is sustained, then as a matter of course the defendant is allowed to amend. In this case, instead of demurring to the answer the plaintiff moved for judgment on the pleadings. This is hardly the proper course where the answer is merely defective in form or manner of denial, as in this case. When the answer admits all the facts necessary to entitle the plaintiff to a judgment, this motion would be proper enough.

And such admission might be made either directly in language or by a total failure to deny or to state facts inconsistent with the allegations of the complaint. But when there is an attempted denial of a fact necessary to sustain the plaintiff's action, however imperfect that denial may be, it should be reached by demurrer.

The plaintiff cannot be placed in a better position by having made a rather irregular motion, then he would be if he had demurred. It would be improper to modify our judgment, as requested.

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Petitioner further asks, if we will not make the order for judgment on the pleadings, that we require the defendant to pay the costs of this appeal as a prerequisite, a condition precedent to his being allowed to amend his answer and make his defense in the case. We see no reason for such a course. There is nothing in the case to show us that defendant is making a sham defense. For aught we know, his defense may be a perfectly good one. We are not disposed to deprive him of the opportunity of making his defense because perchance he may not have the ready money to pay the costs of this appeal.

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JOHN J. CORBETT, APPELLANT, v. HENRY F. RICE ET AL.,
RESPONDENTS.

Our statute in regard to probate matters does not prohibit bringing suit on an allowed claim; but simply denies the plaintiff costs if he recovers no more than the administrator was willing to allow.

When others than the defendant are necessary parties to a foreclosure suit, the proceeding cannot be in the Probate Court, but must be in equity.

When only the mortgagee and the representative of the deceased mortgagor are necessary parties, the Probate Court and Equity Courts have concurrent jurisdiction.

In those cases where a Probate Court has jurisdiction and can administer full relief, it is in the discretion of a Court of Equity to assume jurisdiction, or turn the parties over to the Probate Court. And if a Court of Equity proceeds with the foreclosure, it has the right either to allow or refuse costs to the mortgagee.

Per dissenting opinion of LEWIS, C. J.

An action of foreclosure cannot be maintained against the estate of a deceased mortgagor after the note and mortgage have been allowed by the administrator as a valid claim against the estate, and before the final settlement, where there are no parties affected except the claimant and the administrator.

When the complaint shows the fact that the claim has been allowed, it is demurrable precisely the same as if it alleged a former suit and judgment upon the same claim, because the allowance of the demand gives it all the effect of a judgment against the estate.

The word "claim" in the Probate Act of this State includes secured as well as unsecured claims.

The only distinction which the law seems to make between secured and unsecured debts is that the former shall have the proceeds of the security applied in its payment, if the security is sold.

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APPEAL from a judgment of the District Court of the Second Judicial District, Ormsby County, Hon. S. H. WRIGHT presiding. •

The facts are stated in the Opinion.

Thomas Wells, for Appellant.

This is a proceeding *in rem*, and Chancery has jurisdiction. (21 Cal. p. 24; 9 Cal. 125; 10 Cal. 380-555; 4 John. Ch. Cases, 616; 9 Cal. 426.)

The section of the Probate Act which prohibits sales except by order of the Probate Court, refers only to sales made by executors or administrators. It does not prohibit judicial sales. (14 Cal. 641; 15 Cal. 256; 18 Cal. 292; 21 Cal. 24.)

Clayton & Clarke, for Respondents.

An allowed claim occupies the same position against an estate as a judgment. It is an established debt, to be paid in due course of administration. The law will not allow an administrator to be harassed with unnecessary suits.

The word "claims" refers as well to debts secured by mortgage or other liens as to debts not secured. (*Ellison v. Halleck*, 6 Cal. 386; *Ellis v. Polhemus*, 27 Cal. 350; *Faulkner et al. v. Folson's Executors*, 6 Cal. 412.)

Opinion by BEATTY, J., BROSNAN, J., concurring in the judgment.

This was a bill filed to foreclose a mortgage executed by the testatrix, and after her death presented with the accompanying note to the executors, and allowed as a valid claim against the estate. The defendants demurred to the bill, and that demurrer was sustained and judgment rendered in favor of the defendants.

The ground of the demurrer was that the District Court, acting as a Court of Equity, had no jurisdiction to hear or determine the cause; that it was a matter exclusively cognizable in the Probate Court.

The only question to be determined on this appeal is, whether the jurisdiction of the Probate Court in such cases is exclusive, or

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whether there is a concurrent jurisdiction in Courts of Chancery to enforce the mortgage against the executors.

It is contended on the part of respondents that the statute of this State in relation to the estates of deceased persons, confers exclusive jurisdiction on the Probate Courts to sell all property, real and personal, of decedents, necessary to be sold for the payment of debts. In support of this proposition, they cite many sections of the Act in relation to the estate of decedents, and also many cases adjudicated in California on a statute almost identical in language with our statute.

Section 150 of our statute reads as follows :

"No sale of any property of an estate of a deceased person shall be valid unless made under an order of the Probate Court, *except as otherwise provided in this Act or other Acts.*"

The first part of this section exactly corresponds to section 148 of the California Act; but the words italicised in our Act are added to those contained in the California Act.

In California the question arose several times, whether this 148th section of the Act absolutely forbade the making of sales of property belonging to estates of deceased persons, otherwise than upon order of the Probate Court, or was only intended to forbid executors and administrators to make such sales without such order.

At first the Courts were disposed to hold that no sales, whether judicial or otherwise, could be made, or at least ought to be made, of the property of a decedent, otherwise than by an order of the Probate Court. (See *Faulkner v. Folsom's Executors*, 6 Cal. 412.)

But subsequently the rulings on this point were changed, and the Courts of that State held this section was only intended to prohibit executors and administrators from selling on their own responsibility, without the order of the Probate Court, and did not prohibit judicial sales if otherwise properly authorized. (See *Fallon v. Butler et al.*, 21 Cal. 24.) Our 150th section, corresponding to their 148th, seems even more clearly than the California Act to authorize the latter interpretation, and we think it should be so interpreted. It is claimed, however, that there are other sections which would by implication at least forbid a Court of Equity enter-

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taining jurisdiction of a foreclosure suit against the representative of a decedent.

Section 142 provides that the effect of a judgment shall be the same, and none other than the mere allowance of the claims by the administrator or executor. Hence it is concluded that the law-makers could not have intended to allow suits to be prosecuted and judgments obtained on *allowed* claims, where nothing would result from the judgment but to leave both parties where they were before the judgment. So far as a simple judgment at law for a money demand is concerned, that argument would seem to be almost unanswerable. And perhaps it is to be regretted that the statute does not say in so many words no action at law should be maintained on an allowed claim. Indeed it seems to have been assumed by the learned Judge, who rendered the opinion in the case of *Fallon v. Butler et al.*, (21st Cal. p. 24) that such was the purport of the California Act.

But, in truth, neither the California nor Nevada Act contains any such prohibition. Section 138 of our Act reads as follows: "No holder of any claim against an estate shall maintain any action thereon, unless the claim shall have been first presented to the executor or administrator." Section 136 of the California Act is, we believe, identical in language with this. This language does not in terms prohibit the bringing of suits on claims allowed, nor restrict suits to claims rejected. Nor is there any other clause containing such prohibition or restriction. It only requires the presentation to the administrator or executor with the proper proofs so as to inform him of the facts of the case, and allow him to act for the best interests of the estate. There is also another section (141) which will protect the administrator or executor from costs if he allows all that is justly due.

Now as the right to bring suit for any claim past due is a common law right, we do not think this Act should be so construed as to be in derogation of that right. If any one should be foolish enough to bring suit on a simple money demand against an administrator, he would probably have to pay costs and gain nothing but an empty judgment, which, so far as this State is concerned, would place him in no better condition than the simple allowance of the demand.

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Possibly, if he wished to proceed against the estate of the decedent in another State or county, the judgment might be more available.

But when the demand is secured by mortgage, and other parties besides the decedent and mortgagee are interested, it would frequently be absolutely necessary to invoke the aid of a Court of equity jurisdiction to afford proper relief.

Suppose A borrows \$1,000 of B, and executes his note and mortgage on a house and lot to secure the debt. He afterwards sells the house and lot to C, subject to the mortgage, and then dies. The property is depreciated in value so as to be worth only \$500. C, the purchaser, has come under no personal obligation, and A's estate is not fully solvent. How is B, to get his money? To get the claim allowed against A's estate won't do, because the estate is not solvent and would only pay a dividend without the mortgaged property. To abandon all claim against the estate, and pursue his remedy against the mortgaged property in the hands of C, he would get only \$500. The Probate Court could not make an order to sell the property of C, who is alive. The only way would be to proceed in equity against C and the executor of A; have a decree against the land, to sell that first, and then an order on the executor of A to pay, in the due course of administration, any balance which the mortgaged premises did not discharge.

We hold, then, that Equity Courts have jurisdiction to foreclose mortgages against the estates of deceased persons. In some cases those Courts have exclusive jurisdiction. That is in those cases where it is necessary to bring before the Court other parties over whom the Probate Court can have no jurisdiction. In other cases, where the only necessary parties to the proceeding are the mortgagee and the representative of a deceased mortgagor, the jurisdiction of the Probate Court is concurrent with that of the Equity Court.

But whilst the two Courts have concurrent jurisdiction in such cases, we think a Court of Equity has a discretion in any given case as to whether it will exercise that jurisdiction or leave the parties to the ordinary remedy in the Probate Court. In this respect, Courts of Equity are different from Courts of Law. If a Court of Law has jurisdiction of a case and the parties thereto, it has no

discretion ordinarily to hear and determine it. But Courts of Equity exercise a discretion as to whether they will hear a case or afford the relief sought in various cases where there is no question as to their power and jurisdiction.

If a suit is brought where there are necessary parties, whose rights could not be adjudicated in a Probate Court, the Equity Court must of necessity hear the case. But if there are no necessary parties to the suit except the mortgagee and the representative of the mortgagor, then the Chancellor might well refuse to entertain the bill, unless some special hardship would arise to the mortgagee by turning him over to the Probate Court.

If the mortgagee's security was sufficient to pay his debts at the time of bill filed, but likely to depreciate in value, and the personal estate of decedent were involved in litigation, and it was likely to be a long time before it was determined if it could be made available to pay the debts of the deceased, perhaps it would be just and proper to sell the mortgaged property under a decree in equity, before waiting to see if the personal property would pay the mortgage and other debts. If, on the other hand, the estate was perfectly solvent, and enough of the personalty to pay all debts, it would be hardly proper for the Chancellor to hurry the sale of the mortgaged property before the executor could realize from the personalty and extinguish the mortgage debt with the proceeds.

Every case of this sort would present itself very much to the discretion of the Judge, and he might, in the exercise of a sound discretion, either hear and determine the case, or else on motion dismiss it without prejudice, leaving the party to pursue his remedy before the Probate Court.

But we think a demurrer cannot be sustained in a case like this unless the bill shows two things affirmatively: First, that it is a case where the Probate Court can administer full relief; second, that the Court is actually proceeding and taking steps for the sale of the property.

The latter proposition is not shown in this bill, and therefore the demurrer should not have been sustained. The judgment must be reversed; but it is left entirely discretionary with the Court below whether it will proceed with the trial of the case, or on motion dismiss the bill without prejudice, allowing the plaintiff to show, if he

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desires it, either by amendment to his bill, or otherwise by affidavit, any special reasons for proceeding with the case. It is also entirely in the discretion of the Court below, if the foreclosure proceeds in that Court, to allow costs to the plaintiff, or withhold them, as he shows or fails to show on trial the necessity of this proceeding, as the Court may apportion the costs in its discretion.

Dissenting opinion by LEWIS, C. J.

The record in this case presents but one question for determination upon this appeal, namely: Can an action of foreclosure be maintained against the estate of a deceased mortgagor after the note and mortgage have been allowed by the administrator as a valid claim against the estate, and before the final settlement? In my opinion, as a general rule, it cannot. The Act entitled "An Act to regulate the settlement of the estate of deceased persons" (Laws of the year 1861, p. 186) clearly directs the manner in which claims against the estate of deceased persons shall be presented and disposed of. Section 135 declares that "every claim which has been allowed by the executor or administrator, and approved by the Probate Judge, shall within thirty days thereafter be filed in the Probate Court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration."

Section 136 provides that "when a claim is rejected, either by the executor or administrator, or the Probate Judge, the holder shall bring suit in the proper Court against the executor or administrator within three months after the date of its rejection if it be then due, or within three months after it becomes due, otherwise the claim shall be forever barred." And Section 142 declares that "the effect of any judgment rendered against any executor or administrator upon any claim for money against the estate of his testator or intestate, shall only be to establish the claim in the same manner as if it had been allowed by the executor or administrator and the Probate Judge; and the judgment shall be that the executor or administrator pay in due course of administration the amount ascertained to be due."

Though the bringing of a suit against the estate of a deceased person, as in this case, seems nowhere expressly prohibited in the

Act referred to, yet as another method of proceeding is explicitly prescribed, that, it seems to me, should be pursued, at least whenever it furnishes a complete remedy. So, too, the provision that suit upon *rejected* claims must be brought within a given time, also raises an implication that no suit should be brought upon claims allowed. Again, when a judgment is obtained against an estate, it is expressly provided that no execution shall issue thereon, and that its only effect shall be to establish the claim in the same manner as if it had been allowed by the executor or administrator. (Sec. 142.) Then the only object of the suit against the estate is to establish the claim as a valid demand against it to be paid in due course of administration. Hence, a judgment places the claim in no better position than if it were allowed by the executor or administrator as a valid demand against the estate. Indeed the allowance of the claim, as a general thing, is equivalent to a judgment against it. If the executor or administrator allow a claim, it is all the law requires him to do, and the creditor of the estate is placed in as favorable position as if he had his judgment. I can therefore see no cause of action against the estate. When, as in this case, the complaint shows the fact that the claim has been allowed, it is demurrable precisely the same as if it alleged a former suit and judgment upon the same claim, because the allowance of the demand gives it all the effect of a judgment against the estate. A judgment upon an allowed claim would be utterly useless, and for that reason, if no other, the estate should be protected from the burdens of litigation, which could result in no good. It is claimed, however, that the same rule governing unsecured claims against an estate does not apply to demands which are secured by mortgage. But I am unable to find that the Probate Act referred to recognizes any distinction. The law requires all claims to be presented for allowance or rejection, and prescribes the manner in which they shall be paid, and it seems to be conceded that the word "claim" includes secured as well as unsecured claims. And it is so held in California. (*Ellison v. Halleck*, 6 Cal. 386; *Ellis v. Polhemus*, 27 Cal. 350.) The only distinction which the law seems to make between secured and unsecured debts is that the former shall have the proceeds of the security applied to its payment if the security is sold. The view which I have taken of this question is

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fully supported by the Supreme Court of California in the case of *Ellison v. Halleck et als.*, 6 Cal. 386, and *Faulkner et als. v. Folsom's Executors*, Id. 412. True, some doubt was cast upon the authority of these cases by the same Court in the case of *Fallon v. Butler et al.*, 21 Cal. 24. But the authority of *Fallon v. Butler* has also been very much weakened by the more recent decision in the case of *Ellis v. Polhemus*, 27 Cal. 350. I am therefore disposed to recognize the decisions in *Faulkner et als. v. Folsom's Executors*, as correctly announcing the general rule of law. I do not wish to be understood as holding that a Court of Equity has no jurisdiction in cases of this kind, but simply that as the allowance of a claim against the estate (where there are no necessary parties except the claimant and the executor) gives the creditor all the relief which a judgment would, the showing of that fact in their complaint, like the showing of a former judgment upon the same claim, would make the complaint bad on general demurrer.

The judgment of the Court below should therefore be affirmed.

 TERENCE G. SMITH, ON APPLICATION FOR WRIT OF HABEAS CORPUS.

Whilst our statute authorizes ministerial officers to carry into effect the judgments of criminal courts in all cases where the punishment is less than death, upon receipt of a certified copy of the judgment or sentence, thus dispensing with the necessity of a regular warrant for execution, still it does not prevent the officer from proceeding to execution of the judgment upon receipt of a formal warrant reciting the judgment of the Court, and requiring the officer to execute that judgment.

The judgment in a criminal case recites that the prisoner was brought into Court, and plead guilty, "whereupon the Court sentenced the said Terence G. Smith," etc. Whether this record shows affirmatively that there was no interval of time between the plea of guilty and sentence, query?

If it does, it only shows error on the part of the Court, and defendant should have excepted to the action of the Court, and taken an appeal if dissatisfied. *Habeas corpus* is not the proper remedy to correct errors.

Oral evidence is not admissible to show error in the proceedings of the Court below.

MATTER of *Habeas Corpus* on petition of Terence G. Smith to the Supreme Court of Nevada.

Thomas Wells, for Petitioner.

Petition of Smith for Writ of Habeas Corpus.

The judgment was void for the reason that an interval of six hours did not transpire, as the statute requires, between the plea of guilty and the sentence passed by the Court.

The Warden of the Penitentiary, under the statute, is only authorized to detain a prisoner in custody when he has a copy of the judgment ordering the imprisonment. The return of the Warden not showing any copy of the judgment against Smith, shows no authority to hold him.

The Court had no jurisdiction to enter judgment until the expiration of six hours after plea entered.

George A. Nourse, Attorney General, for the State.

Opinion by BEATTY, J., LEWIS, C. J., concurring.

In this case, the prisoner asks to be discharged from the State Prison, where he has been confined for some months past, and bases his petition upon two grounds :

First. That he is not held by any legal commitment or legal authority.

Second. There has been no legal judgment of imprisonment against him.

After sentence was pronounced against the prisoner, a regular order of commitment was made out, and he was carried to the State Prison, and delivered into the custody of the Warden, who also received at the same time with the prisoner, the order of commitment, which is in the following words :

“ The defendant, Terrence G. Smith, having been indicted by the Grand Jury of the Fourth District Court of Washoe County aforesaid for grand larceny, and the said Terrence G. Smith, having been duly arraigned on said charge before the above entitled Court, entered his plea of guilty, whereupon the Court sentenced the said Terrence G. Smith to one year's imprisonment in the State Prison to hard labor, and that the Sheriff of this County take said Smith, within ten days from the date hereof, to the State Prison, and that the term of said imprisonment date from the time of his delivery at the State Prison.

“ Now, therefore, it is ordered, adjudged, and decreed that the Sheriff of this County, within ten days from this 4th day of June,

Petition of Smith for Writ of Habeas Corpus.

A.D. 1866, take Terence G. Smith to the State Prison, and deliver him to the State Prison Warden, and that he be there confined one year from the date of his delivery there, to hard toil."

The prisoner's counsel contends this warrant is insufficient, because the four hundred and fifty-first section of the Criminal Practice Act says :

" When a judgment has been pronounced, a certified copy of the entry thereof in the minutes shall be forthwith furnished to the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary to justify or require the execution thereof, except where judgment of death is rendered."

This section requires the Clerk of the Court to do a certain thing, that is, to furnish the officer or officers who are to execute the sentence forthwith with copies of the judgment to be enforced. Doubtless, in this case, the Clerk should have given one copy of the judgment to the Sheriff to authorize him to conduct the prisoner to the State Prison. He should also have sent another to the Warden of the Prison to authorize him to detain the prisoner in custody. But the failure of the Clerk to furnish these papers could not destroy the effect of the judgment of the Court.

Whilst we do not have before us by the return of the Warden a full copy of the judgment, we have a regular commitment under the seal of the Court, properly attested, reciting all the material part of the judgment, and showing fully the authority of the Warden to hold the prisoner.

The four hundred and fifty-first section does not say a prisoner shall not be held unless the officer has a copy of the judgment, but merely dispenses with a more formal warrant in all cases except where the penalty is death. It does not vitiate or render unavailing a formal warrant reciting the judgment or the material portions thereof, and commanding the proper officer to carry it into effect. It only states what may be a substitute for such a warrant.

The legality of the judgment is contested on the ground that the sentence or judgment was passed in less than six hours after the plea of guilty was entered. The record of the case recites that the prisoner was brought into Court and plead guilty, " whereupon the Court sentenced the said Terence G. Smith," etc.

The counsel for prisoner contends that this recital sufficiently

Petition of Smith for Writ of Habeas Corpus.

shows that there was no interval of time between the plea and sentence, but that the one followed immediately after the other. He further purposed to show, by oral testimony, that there was no interval, but that sentence was passed immediately after the plea was entered. The Attorney General admitted that such fact could be proved, and that it should be considered proved, if it was lawful to introduce oral testimony for the purpose of attacking the judgment.

Whether the recital above quoted does or does not sufficiently show that the sentence immediately followed the plea without the intervention of time which the statute (secs. 485-6 of the Criminal Practice Act) requires, it is not now material to determine. If it does, it would at most but show error or irregularity on the part of the Court below in not fixing a subsequent time for the passing of sentence. Such error must be taken advantage of in the manner prescribed by statute. The defendant should, in due time, have excepted to the action of the Court and taken his appeal to this Court.

Habeas corpus is not the proper writ to review the decisions of a District Court, and correct its errors or amend its irregularities. For the distinction between *unlawful* acts and those which are merely erroneous or irregular, see Hurd on *Habeas Corpus*, pages 331 to 333. The proposition to introduce oral evidence to show error in the proceedings of the Court below is to us a novel one, to say the least of it. Oral evidence is sometimes introduced in connection with the judgment record to show what was litigated by the parties; to show the facts more fully than they would be shown by the record. But oral evidence is never admitted to contradict the record, or to show error in the Court rendering a judgment.

The prisoner must be remanded to the custody of the Warden of the State Prison, there to remain until the expiration of the term for which he was sentenced, or until otherwise legally discharged.

Special concurrence by BROSNAN, J.

I concur in this opinion merely upon the ground of the confession of guilt of the prisoner in open court.

Mears et als. v. James et al.

MEARS ET ALS., RESPONDENTS, v. JOHN JAMES ET AL.,
APPELLANTS.

It is error to render judgment against a party who is made defendant by amending a complaint without giving him an opportunity to answer.

Hearsay evidence cannot be reviewed to show that one is a partner in a particular firm.

Parties renting property to amalgamators crushing their ore and running it into their amalgamating pans, at a fixed price per ton, do not thereby become partners with the amalgamators.

A & B, being partners in any particular business, A is not bound to notify the world nor any particular person that he is not a partner of B's in a new and distinct business, into which B enters with other partners, and under a different firm name.

APPEAL from the District Court of the Fourth Judicial District,
Hon. C. C. GOODWIN presiding.

The facts are stated in the Opinion.

Wallace & Flack, for Appellants. .

North & Harris, for Respondents.

Opinion by BEATTY, J., BROSNAN, J., concurring.

In this case a suit was brought on a merchant's account, and two promissory notes, against two of the defendants, John James and James Hill, charging them to be members of and the parties composing the firm of James & Co. One of the defendants, James Hill, answered, denying all the allegations of the complaint so far as he was concerned, the real defense being that he was not a member of the firm of James & Co. After the trial had commenced, the plaintiffs asked and obtained leave of the Court to amend their complaint by adding the names of W. H. James, Jasper O'Farrell, E. A. Mier and J. W. Farrington as defendants. When this amendment was made, W. H. James, who was present in Court, asked for time to be given him to answer the complaint before the trial proceeded. This the Court refused. After the plaintiffs had introduced their evidence, James Hill moved for a nonsuit as to himself, which the Court refused. The trial then proceeded, and judgment was had against all the defendants. The

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defendants James Hill and W. H. James then moved for a new trial, which was refused. The grounds of error assigned are numerous, and many of them well taken. But it will be necessary to notice only a few of them.

In the first place, the nonsuit should have been granted as to James Hill, because the testimony of plaintiffs showed clearly that the firm of James & Co. consisted ostensibly of John James, E. A. Mier and J. W. Farrington. Possibly one or more of the sons of John James may have participated in the profit and loss of that firm by secret arrangement with their father, and thereby became responsible for the debts of the firm. But beyond all question, as shown by the plaintiffs' own testimony, James Hill had nothing to do with the profits or losses of that firm—was not a partner, and no act of his is shown whereby he became responsible for their debts. The only evidence introduced tending to show that Hill was a member of that firm was the testimony of one Bostwick, who says W. H. James told him Hill was a member of the firm of James & Co. This testimony was mere hearsay as to Hill, and could not have been considered so far as he was affected. W. H. James himself being a defendant, his declaration might have been received to affect him, but not to affect Hill.

The judgment is erroneous as to W. H. James, because he was not allowed the statutory time to put in his answer and make his defense.

The facts about this case are these: (and about those facts there seems to be no dispute whatever) John James and James Hill were the owners as tenants in common of a piece of real estate, on which was erected a quartz mill known as the Napa Quartz Mill. In January, 1862, they entered into a contract with Farrington & Mier, by which they leased to Farrington & Mier a piece of ground adjacent to the mill, and contracted to crush ore for Farrington & Mier, in their mill, run the crushed ore or pulp into the works of Farrington & Mier on the leased ground, and receive five dollars per ton for the crushing. They were also to increase the power and capacity of the mill, and to put drums on their main shaft, and thereby furnish motive power to Farrington & Mier for their amalgamating works.

After this arrangement was made between Hill and John James

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on one side and Farrington & Mier on the other, John James agreed to become a partner with Farrington & Mier in their reduction operations. From that time forward, the business of Hill and John James in crushing ore was carried on in the name of Hill & James, though some of their creditors had their names reversed and charged their accounts to James & Hill. The other business of amalgamating or reducing the crushed ore on the leased premises, was carried on in the name of James & Co.—the latter company consisting of John James, J. W. Farrington and E. A. Mier.

The learned Judge who tried this cause below seems to have thought that James Hill was responsible for the debts of James & Co., not because he was a member of that company or in any manner interested in their business, but because they had erected their improvements on land in which he was part owner, and because one of the partners in the firm of James & Co. was also a partner with Hill in the firm of Hill & Co., and Hill never gave notice that he was not interested in the firm of James & Co.

In the first place, Hill & James leased certain real estate and contracted to furnish certain motive power to Farrington & Mier for a stipulated price. This did not make them partners with Farrington & Mier. Nor is there any presumption of law that a landlord is the partner of his tenant. Landlords certainly need not notify the world that they are not partners of their tenants. Secondly, after the lease was executed by James & Hill to Farrington & Mier, James, without the knowledge of Hill, so far as the testimony shows, became a partner with Farrington & Mier. We are unable to see how that could affect Hill. As James' partner, he was responsible for all legitimate transactions done in the firm name. But James was not acting for the firm or in the firm name when he entered into the firm of James & Co. This was a new firm, formed for a business separate and distinct from that of Hill & James. Certainly, it was not the business of Hill to follow James around the world and notify everybody, if James formed a new partnership he would not be responsible for the debts of such firm.

We have said, perhaps, more than was necessary about this case; but the case of *Jones & Colla v. O'Farrel & Co.*, lately decided by this Court, involved the same questions as those involved in this

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case. After that case was decided, the Court below persisted in sustaining in this case the same rulings made in that. We have endeavored to so state our views that no further errors can be made in cases arising out of these partnership transactions.

The judgment of the Court below is reversed, and a new trial ordered.

LEWIS, C. J., having been counsel in this case in the Court below, did not participate in the decision.

H. K. MITCHELL ET AL., RESPONDENTS, *v.* M. BROMBERGER, APPELLANT.

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23	213
2	345
26	143

An attorney or counselor cannot, without the consent of his client, be compelled, and has no right, to disclose any fact which may have been communicated to him by his client, solely for the purpose of obtaining his professional assistance or advice; but this rule is not to be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights.

Whenever, in a suit between the attorney and client, the disclosure of a privileged communication becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his own protection.

The judgment of an inferior Court will not be set aside on appeal, for errors committed on the trial which it appears could not have prejudiced the appellant.

When a cost bill appears regular on its face, and there is nothing in the record to show error in any of the items charged, the refusal of the Court below to re-tax the costs must be presumed to be correct.

APPEAL from the District Court of the First Judicial District, Hon. RICHARD RISING presiding.

Perley & DeLong, for Appellant.

First.—The Court below erred in allowing Mr. Mitchell, one of the respondents, who was a witness in the cause, to testify as to communications made to him during the transaction of the business out of which this suit has grown.

It is not denied that a witness under such circumstances may state generally the description of the business which was done—as, for instance, that he drew a confession of judgment, filed an answer,

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and that there were various consultations, and the amount of money or property involved.

This is necessary in order to enable the Court to arrive at any conclusion as to the value of the services rendered, or the responsibility assumed by the attorney. This is the rule laid down by the Court below, but departed from, as will appear hereafter, in the direct rulings of the Court upon the testimony.

The rule of law in regard to what are known as "privileged communications" is so well known to this Court that we do not feel at liberty to make any extended citations of authority; but we will call the attention of the Court to the rule as laid down in some of the books, and as it is established in the United States. In Greenleaf's Ev. Vol. 1, page 329, § 237, the rule is thus stated, as laid down by Lord Brougham: "This rule is not qualified by any reference to proceedings pending or in contemplation. If touching matters that come within the ordinary scope of professional employment they receive a communication in their professional capacity, either from a client or on his account, and for his benefit in the transaction of his business, or which amounts to the same thing, if they commit to paper in the course of their employment on his behalf matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, *but bound to withhold them*, and will not be compelled to disclose the information, or produce the papers in any Court of law or equity either as party or as witness."

Again, page 332, Sec. 240: "This protection extends to every communication which the client makes to his legal adviser for the purpose of professional advice or aid upon the subject of his rights and liabilities."

On pages 329-330 and 331 the reason of the rule is discussed, the same being based upon public policy, and the protection it affords being treated as essential to the administration of justice. (See also *Hatton v. Robinson*, 14 Pick. 422; *Barnes v. Harris*, 7 Cush. 576; *Hager v. Shindler*, Sup. Court, Cal. October term, 1865; same case on re-hearing, Sup. Court, Cal. July term, 1866, reported in Vol. 29, page 47.) The statutory provision of this State affirms the same rule. (Stat. 1861, p. 374, § 344.)

Second.—Having shown, as we respectfully submit, that the tes-

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timony referred to was not admissible, we will endeavor to show not only that it was of such a character that it might have influenced the verdict of the jury, which is sufficient to entitle the appellant to a new trial, but that it had a direct tendency towards such an influence. It is not so much to any isolated fact that we refer for our purpose, as to the general scope and tendency of the testimony.

It presented Bromberger in this light before the jury: being insolvent and knowing this fact, he wished to give preference to his brother and to Armer, his intimate friend, by confessing judgment to them to the exclusion of his San Francisco creditors. No one can say how many inferences might have been added by the jury. To them it might have seemed that this brother and Armer were selected to obtain this confession, (considering the relation between the parties) merely to cover up the property in the store, and that there was no actual indebtedness existing upon which to found the confession of judgment. Others might have regarded it wrong thus to exclude the San Francisco creditors. The same may be said with reference to the transaction with Paxton & Thornburgh.

All these disclosures had a tendency to place the appellant in a most unfavorable light before the Court and jury. And in this connection we refer to the difference in the amount of the verdict, and the amount of the bill presented by Bromberger, though no additional service had been rendered after the presentation of the bill.

One of the grounds upon which this motion is based is, that the verdict was rendered under the influence of passion and prejudice, which we think may be fairly inferred from the last circumstance mentioned, and the nature of the testimony admitted. For the rule on this subject, see *Santillan v. Moses*, 1 Cal. 93; *Mateer v. Brown*, 1 Cal. 221; *Innis v. Steamer Senator*, 1 Cal. 462; *Farmers & Manuf. Bank v. Whinfield*, 24 Wend. 419; *Winkley v. Foye*, 8 Foster N. H. 513; *Winkley v. Foye*, 33 New Hamp. Rep. 171.

Mitchell & Hundley, in *pro per*.

Opinion by LEWIS, C. J., full Bench concurring.

The plaintiffs, who are practicing lawyers in Virginia City, bring

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this action to recover the sum of one thousand and thirty-seven dollars, which it is claimed is due them from the defendant for professional services rendered by them some time during the year 1865. The defendant puts in issue all the material allegations of the complaint by denying the indebtedness; denying that he ever employed the plaintiffs, or either of them, as his attorneys or counselors, or in any other capacity; and that they, or either of them, have ever acted as his attorneys or counselors, or done or performed any labor of any character whatever for him. Upon the trial the plaintiff Mitchell testified on his own behalf, and stated fully the manner in which he and his partner were employed by the defendant; detailed all the services rendered by them, and also stated the counsel which they gave the defendant in the matter in which they were employed.

The defendant objected to and moved to strike out a large portion of this testimony, upon the ground that it was information obtained by the plaintiffs whilst acting as counsel for him, and that it bore the character of privileged communication, which the plaintiffs had no right to disclose without his consent. The Court below refused to strike it out. Of this ruling the defendant complains, assigns it as error, and relies upon it here as the principal ground for reversing the judgment below.

It is undeniably a general rule of the law of evidence that an attorney or counselor cannot, without the consent of his client, be compelled to disclose any fact which may have been communicated to him by his client, solely for the purpose of obtaining his professional assistance or advice; and section 344 of the Practice Act of this State explicitly adopts this rule in the following language: "An attorney or counselor shall not, without the consent of his client, be examined as a witness to any communication made by, the client to him, or his advice given therein, in the course of professional employment."

In the complicated affairs and relations of life, the counsel and assistance of those learned in the law often becomes necessary, and to obtain it men are frequently forced to make disclosures which their welfare, and sometimes their lives, make it necessary to be kept secret. Hence, for the benefit and protection of the client, the law places the seal of secrecy upon all communications made to the attorney in the course of his professional employment, and the

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Courts are expressly prohibited from examining him as a witness upon any facts which may have come to his knowledge through the medium of such employment.

But the claims of justice dictate some exceptions to this rule. It would be a manifest injustice to allow the client to take advantage of it to the prejudice of his attorney; or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. It is therefore held that in such cases he is exempted from the obligations of secrecy. (*Rochester City Bank v. Suydam et al.*, 5 Howard's Pr. R. 254.) In the opinion in that case, Mr. Justice Selden says: "But, independent of this reasoning, and admitting all the previous conclusions to be erroneous, there is still another ground upon which, in my judgment, this motion must be denied. I think that where the attorney or counsel has an interest in the facts communicated to him, and when their disclosure becomes necessary to protect his personal rights, he must of necessity, and in reason, be exempted from the obligations of secrecy. For instance: suppose a client makes a private and confidential statement of facts by letter to an attorney employed to conduct a suit, inducing him to take a particular course with the suit, which proves eminently disastrous, and he is afterward prosecuted by his client for unskillful management of the cause, can it be claimed that he cannot produce the letter in his justification? I apprehend not."

We think it safe to say that whenever in a suit between the attorney and client the disclosure of privileged communications becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his own protection. In this case the appellant complains that a large portion of the plaintiff Mitchell's testimony consisted of facts which were communicated to him whilst he was acting as the attorney of the defendant, and the disclosure of which was not necessary for the protection of his own rights. If we agreed with counsel for appellant upon that fact, the judgment below could not, in our opinion, be reversed, for the evidence so improperly admitted is not of a character which could have injured the defendant in this case. That the judgment of an inferior Court will not be set aside on ap-

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peal for errors committed on the trial, which, it appears, could not have prejudiced the appellant, is a proposition thoroughly settled by the authorities. The defendant in this case, however, claims that the evidence improperly admitted presented him in a false light before the jury. It disclosed the fact to them that whilst he was in failing circumstances he wished to give his brother a preference over his other creditors, by confessing judgment in his favor. Although many such facts were disclosed by the evidence of Mitchell, we see nothing in it which should have a tendency to so prejudice the jury against the defendant, that they would be influenced by it in their verdict in this case. Taking all the testimony together, we do not see that the defendant endeavored to do anything dishonest or very improper in the confession of the judgment referred to; and even if he had, it is impossible to believe that it could have influenced the jury in making up their verdict in this case. The plaintiffs are suing for a certain sum of money which they claim to be due them for services rendered for the defendant; how the fact that the defendant was desirous of preferring some of his creditors over others could have induced the jury to give a larger verdict for the plaintiffs, who acted as his attorneys and counselors in the whole matter, than they would otherwise have done, is not easily understood. Indeed, to conclude that they did so would be unnatural and contrary to our understanding of the motives which govern the actions of men. The defendant's disposition towards his creditors could not in any way increase or diminish the value of the plaintiffs' services, and we cannot conclude that the jurors were influenced by any such circumstances without questioning their honesty and good sense. It is evident, therefore, that the defendant was not injured in this case by the admission of the testimony complained of.

This case has been twice tried, the plaintiffs recovering judgment both times; and we are satisfied that another trial would not, and indeed ought not, to change the result.

Another error complained of by the appellant is that the Court below refused to retax the costs upon a motion for that purpose made by him. What errors in the cost bill the appellant complains of does not appear in the record.

Every item seems regular on the face of the bill. We are therefore unable to determine from the transcript whether the Court be-

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low ruled correctly or not, but in the absence of positive error shown we must presume that the ruling was correct. Counsel for appellant mentions the error which they complain of in their brief, but that is not sufficient here. The record must show the error, if any exists. A statement of facts in the brief of counsel will not supply a deficiency in the record. Had it appeared that the one hundred dollar item was improperly charged, we could not hesitate to hold the ruling of the Court below incorrect. But how are we to ascertain whether it is a legitimate charge or not? Most assuredly, only by the record in this case. We cannot go out of that record for facts upon which to determine the conditions of the ruling below, and as we have stated before, that record discloses no error.

The judgment of the District Court is therefore affirmed, and it is so ordered.

STATE OF NEVADA EX REL. R. M. DAGGETT, RE-
SPONDENT, v. JOHN A. COLLINS, APPELLANT.

An election cannot be held for an office at a time not fixed by law for such election.

The phrase, "next general election," in the nineteenth section of "An Act to create a Board of County Commissioners, &c.," (Laws of 1864-5) means the general election on alternate years, commencing with 1864, and has no reference to the election of 1865, which is in some respects to be held as a special election, interpolated on the general system of biennial elections.

APPEAL from the District Court of the First Judicial District, Storey County, the Hon. R. S. MESICK presiding.

The facts are stated in the Opinion.

R. H. Taylor, for Appellant.

The Court in this proceeding could not oust defendant without holding that relator had title to the office. (Laws of 1864-5, p. 165, secs. 7 and 8.)

The defendant, having rightfully entered, was entitled to hold the office until his successor was legally elected. Defendant was entitled to hold until after the election in 1866. (Laws of 1864-5,

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p. 416, sec. 16; Laws of 1864-5, p. 426, sec. 56; *McKune v. Weller*, 11 Cal. 49; *Bethany v. Sperry*, 10 Conn. 200; *Spencer v. Champion*, 9 Conn. 536; Const. Art. 5, sec. 8; Art. 6, sec. 3; Art. 15, sec. 11; Art. 17, sec. 13; Laws of 1864-5, p. 115, sec. 32; Laws of 1864-5, p. 262, secs. 18 and 19; Laws of 1864-5, p. 257, sec. 1; Chit. Black., Book 1, p. 136.)

Dighton Corson, District Attorney, for Respondent.

Opinion by BEATTY, J., full Bench concurring.

In the month of May, 1865, there was a vacancy in the office of Superintendent of Public Schools for the County of Storey. The Board of Supervisors appointed John A. Collins to fill the vacancy. Prior to the November election, 1865, they made a further order for an election of a Superintendent to fill a vacancy in that office which would occur by the expiration of the term of office of John A. Collins. At such election the relator, R. M. Daggett, was a candidate for the office, and having received the largest number of votes cast, and a certificate of election, and having executed a bond and qualified as Superintendent of Public Schools, demanded to be let into office.

This demand being refused, an action in the nature of a *quo warranto* was brought to remove Collins and place the relator in possession of the office.

The District Court rendered a judgment removing Collins, but refused to place Daggett in office, deciding in effect that neither one of the parties was entitled to the office. From this judgment Collins appeals.

We find nothing in the Constitution to govern this case. The sections of the laws of Nevada bearing on the question are as follows: Section sixteen of "An Act to provide for the maintenance and supervision of Public Schools," page 416 of the Statutes of 1864-5, reads as follows:

"A County Superintendent of Public Schools shall be elected in each county at the general election in the year eighteen hundred and sixty-six, and every two years thereafter, who shall take his office on the first Monday in January next succeeding his election, and hold for two years, and until his successor is elected and quali-

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fied. He shall take the oath or affirmation of office, and shall give an official bond to the county, in a sum to be fixed by the Board of Commissioners of said county."

This is the only law we can find providing for the election of Superintendents of Public Schools. No such election can be held without some law authorizing it. (See *Sawyer v. Haydon*, 1 Nevada State Reports, 75.) Consequently the election in 1865 was wholly void and of no effect.

The next question is, did Collins hold his office subsequent to the election of 1865, or did the office become vacant without the means of filling it? Section nineteen of "An Act to create a Board of County Commissioners," reads as follows :

"When a vacancy shall occur in any county or township office, except the office of County Commissioner, the Board of County Commissioners shall appoint some suitable person, an elector of the county, to fill the vacancy until the next general election." (See Laws of 1864-5, p. 262.)

Under this section, the Board of County Commissioners could undoubtedly fill the vacancy. The important question is, when should the appointment or commission issued by that Board expire? The law says one thus appointed shall hold "until the next general election." The question is, when was the next general election after May, 1865? The Constitution evidently contemplates a general election every alternate year, commencing with 1864. The legislative branch of the Government has carried out that view by declaring there shall be a general election in 1866, and each alternate year thereafter. (See Election Law of 1866.)

But for the purpose of starting the State Government on its regular course, an election for Assemblymen, and perhaps some other officers, was by the schedule of the Constitution provided to take place in the fall of 1865. This election for the year 1865 is called in the schedule a *general* election, but in some particulars it is rather a special than a general election. Neither the law nor the Constitution, so far as we can see, provided for the election in 1865 of any officers except members of the Legislature and Justices of the Peace, whilst all the other State and county officers are required to be elected at the general elections held on alternate years, beginning with 1864.

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We think, then, to carry out the spirit and intention of the law-makers, we must interpret the phrase "until the next general election" to mean until the next general election at which a Superintendent can be elected. In other words, that the "next general election" means the next general election taking place on an alternate year after 1864, and not in this particular law having any reference to the election of 1865, which was interpolated on the general system of our laws by the schedule to the Constitution. Any other interpretation would operate injuriously to the public interest, and would not conform to the spirit of the law, although it might to the letter thereof. The more liberal interpretation of this law may be highly beneficial to the public, and can injure nobody.

The judgment of the Court below is reversed. The cause will be dismissed at the cost of the relator.

ADAM WALTER, RESPONDENT, *v.* J. NEELY JOHNSON
ET ALS., APPELLANTS.

Upon the conveyance of certain land and water privileges by W. to R. and J., an agreement was entered into, which declared that "Whereas, the said Railey and Johnson have paid two thousand dollars in cash to said Walter, and there remaining unpaid one thousand dollars which is held as security by said Railey and Johnson, to protect them from any adverse claim which may be set up to said property, franchise or privilege, or any part thereof, by any other person or persons; now, therefore, if the said Railey and Johnson, their heirs or assigns, shall not within six months herefrom, have to pay for the release or discharge of any adverse claim against said property or franchise, or have recovered against them any part or portion thereof, then the said Railey and Johnson agree to pay to said Walter, his heirs or assigns, the said sum of one thousand dollars in gold coin of the United States, at the expiration of six months herefrom; otherwise, this bond to be null and void." *Held*, that to release Railey and Johnson from the payment of the one thousand dollars, they must show that a valid and substantial claim was set up to the premises; and that to protect themselves, they were compelled to purchase, or extinguish it.

"Adverse claim," in such an instrument, must be interpreted to mean such a valid and paramount title or right which, if asserted in Court, would divert the title granted by the plaintiff.

APPEAL from the District Court of the Second Judicial District,
Hon. S. H. WRIGHT presiding.

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The facts appear in the Opinion.

Sunderland, Wood & Hillyer, attorneys for Appellants.

The testimony shows that at the time of the purchase by defendants, Hayt and Hill had a claim to a portion of the property bought adverse to Walter, and that it was known to Walter.

That the vendee cannot resist successfully, a suit for the purchase money while in peaceable and quiet possession, or without showing an outstanding paramount title in a third person, need not be controverted ; for that is not the case.

The only question upon this branch of the case is, whether Johnson and Railey expended the one thousand dollars retained, properly, for the purpose of procuring the release or discharge of an adverse claim ?

The deed from plaintiff to defendants was made at the same time as the bond in suit ; both were parts of one transaction.

In construing this bond, the words are to be taken to have been used by the parties in their ordinary sense ; and when the words used are free from ambiguity, the intention of the parties will be gathered from them, and the work of the Court will be one of interpretation merely, and not one of construction, strictly speaking. (1 Mass. 91 ; 2 Parsons on Cont. 69 and note ; 1 Greenleaf's Ev. 277 and note.)

Once in possession of the fact that at the time of the purchase, and the execution of this bond, there was a dispute as to the ownership of a portion of the property, the interpretation of this bond becomes easy, especially as the nature of the adverse claim was known at the time to all parties.

What did the parties mean by an "adverse claim?" Is it possible for the Court to interpret these words, as they are used in the bond, to mean "eviction," or "paramount title?" We think not. Defendants could have defended an action for the purchase money upon those grounds, without the necessity of any special agreement.

The language of the bond is, that if the defendants shall not "have to pay for the *release or discharge of any adverse claim*," then the bond is to be of force. Nothing can be clearer than that in the use of these words, the parties had reference to other claims

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than those which had their foundation in indisputable right, or paramount title.

The words *releuse* and *discharge* can have no effect, if defendants had no power to procure a release or discharge of an adverse claim by any other mode than contesting a suit at law. The very object of the parties in retaining the money and executing the bond was, to enable them to buy off adverse claimants, without the necessity of going into ruinous litigation.

In a legal sense, the word "adverse" would oftener indicate a claim doubtful in its character, than one valid beyond question. We speak of an adverse possession, as an act against the rightful owner which may ripen into a good title in time.

We urge that the claim of Hayt and Hill was such an adverse claim as the defendants were justified in removing; that this claim did exist and was known to all parties at the time the bond was executed, and that it is fair to assert that this was the principal, if not the only adverse claim the money was retained as security against.

2d. Plaintiff has no equitable lien upon this property.

Such lien could only exist for unpaid purchase money, and, as already shown, that has been paid in accordance with the terms of the bond.

Although there is some conflict, the weight of authority seems to be that the taking of a note or a simple bond for the purchase money is not a waiver of the lien. The exception is, when some special equity exists founded upon a special agreement, (2 Cal. 287) or when the vendor has manifested an intention to rely no longer upon the estate (1 Mason's Rep. 212).

3d. The vendor's lien is not an absolute charge on land, but only an equitable right to resort to in case there be not sufficient personal estate (1 Blackf. 287; 8 Id. 124; 12 Id. 411).

Plaintiff has not averred or shown that defendants have not sufficient personal estate.

Haydon & Deuson, for Respondent.

1st. The situation and real intention of all parties, and the subject matter, are to be considered in determining the meaning of a con-

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tract. (See 2 Cowen, 195; 8 Mass. 214; 10 Id. 379; 11 Id. 302; 11 Pick. 154; 4 Dall. 345.)

2d. Where a contract admits of two constructions, one of which would make it operative and the other defeat it, the former must be adopted. (See *Archbold v. Thomas*, 3 Con. 284.)

3d. Railey and Johnson will be held to that meaning of this contract which they reasonably knew Adam Walter supposed it to bear, if such meaning can be given to it without making a new contract for the parties. (See 2 Parsons on Contracts, 499, 500.)

4th. A contract is to be, in a proper case, construed *contra proferentum*. (See 2 Parsons on Contracts, 506-7.) Railey and Johnson gave the contract, wrote it themselves, chose their own words, and are held to the strongest meaning against themselves the words will bear.

5th. The only grounds upon which a vendee can refuse to pay purchase money for land bought by, and deeded to him, are by showing an eviction or paramount title in a third party; and he, by defending under a paramount title, takes the burden of proof upon himself. (See *Thayer v. White*, 3 Cal. 230; 2 Kent's Com. star page 472 and notes [b] and [d]; 2 Greenleaf on Ev. top page 267 and note [1]; *Fowler v. Smith*, 2 Cal. 44; *Frisbie v. Hoffnagle*, 11 Johns. 50; 5 Johns. 120; *Kerr v. Shaw*, 13 Johns. 236; *Mauzy v. Porter*, 3 Tenn. 347.)

6th. Johnson and Railey are shown by the evidence at all times to have retained possession of the land, and they cannot retain possession of the land and refuse to pay the purchase money, even under a warrantee deed of the title, for the warranty is not broken until eviction, and an insufficient title might ripen by adverse possession, and by aid of the Statute of Limitations, into a perfect title. (See *Walker v. Sedgwick*, 8 Cal. 402-5; which case also shows plaintiff's right to a vendor's lien.)

8th. That plaintiff is entitled to a vendor's lien upon the land described in his complaint, is evident. (See *Salmon v. Hoffman*, 2 Cal. 142; *Truebody v. Jacobson*, 2 Cal. 286; *Walker v. Sedgwick*, 8 Cal. 403; *Sharp v. Hess*, 15 Cal. 192-3; and the existence of a vendor's lien is inferentially recognized in the case of *Gibson v. Milne et al.*, 1 Nevada Rep. 531-2.)

9th. This being an action to enforce a vendor's lien is a case in

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equity, and comes before the Appellate Court upon the pleadings, testimony and decree, and the Court will render in all such cases the decree that is warranted by the pleadings and testimony. (See *Still v. Saunders*, 8 Cal. 286-7; *Walker v. Sedgwick*, 5 Cal. 192; *Grayson v. Guild*, 4 Cal. 126.) The last named decision was made upon an appeal taken, like this, from an order granting a new trial; and the case cited from 5 Cal. 192 was a suit, like this, brought to enforce a vendor's lien.

Opinion by LEWIS, C. J., full Bench concurring.

This is a proceeding to enforce a vendor's lien which the plaintiff claims against certain property located on the Carson River, in the County of Ormsby. The property upon which it is claimed was sold by the plaintiff to the defendants on the 2d day of July, A.D. 1863, for the sum of three thousand dollars, two thousand of which was paid at the time of conveyance, the remaining thousand dollars was, by agreement of parties, to be retained by the defendants for six months from that time to indemnify them for any adverse claim against the premises which they might be compelled to extinguish during that time. That portion of the written agreement which is material in this case reads as follows: "And whereas, the said Railey and Johnson have paid two thousand dollars in cash to said Walter, and there remaining unpaid one thousand dollars, which is held as security by said Railey and Johnson to protect them from any adverse claim which may be set up to said property, franchise, or privileges, or any part thereof, by any other person or persons; now, therefore, if the said Railey and Johnson, their heirs or assigns, shall not, within six months herefrom, have to pay for the release or discharge of any adverse claim against said property or franchise, or part thereof, or have recovered against them any part or portion thereof, then the said Railey and Johnson agree to pay to said Walter, his heirs or assigns, the said sum of one thousand dollars in gold coin of the United States, at the expiration of six months herefrom; otherwise this bond to be null and void." The defendants having been compelled, as they claim, to purchase an adverse claim against the premises within the six months designated in the instrument above referred to, refused, and do now refuse to pay to the

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plaintiff the one thousand dollars remaining unpaid of the purchase money. The fact that the defendants paid about twelve hundred dollars for an outstanding claim or title to the premises purchased of the plaintiff, does not seem to be disputed.

It is, however, insisted upon by the plaintiff that the adverse claim set up by Hayt and Hill, and purchased by the defendants, was entirely without foundation or color of right, and could not be maintained as a valid right or title to the land in question; that no suit had been commenced against the defendants to eject them therefrom; that they have, ever since the conveyance to them, continued in possession of the premises, and that the purchase of the claim from Hayt and Hill was not necessary to maintain their possession. Such being the state of facts, the plaintiff claims, that under a proper construction of the bond or agreement between him and the defendants, he should recover the balance of the purchase money. In this view of the case, we are disposed to agree with counsel for plaintiff. It is clear, beyond all question, from the evidence presented to us, that the Hayt and Hill claim was but the airy fabric of the imagination—a claim of right without foundation—and that had they commenced suit against the defendants to obtain possession of the premises it is hardly within the range of possibility that they could have recovered, even after making due allowance for all uncertainties attending trial by jury. Indeed, there seems to have been no effort on the part of the defendants in the Court below to show that the Hayt and Hill claim possessed any substantial virtue, or that there was any probability that they would ever have been evicted under it, or that it was in any manner a paramount title. The payment of money to extinguish or purchase such a claim does not come within either the letter or spirit of the instrument referred to. It could not have been the intention of the plaintiff to allow the one thousand dollars due him to be retained as security against any sham or invalid claims which might be made against the premises. The words of the instrument are: “Now, therefore, if the said Railey and Johnson shall not, within six months after the execution of the conveyance, have to pay for the release or discharge of any adverse claim, they will pay to the defendant the balance of one thousand dollars.”

The only rational interpretation which can be placed upon this

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language is, that one thousand dollars was to be paid to the plaintiff within six months from the time of the execution of the instrument, unless during that time the defendants, to protect themselves, were *compelled* to purchase some adverse claim. Now, what is meant by "adverse claim," as used in this instrument? Unquestionably, a valid and paramount title which, if asserted in Court, would defeat that granted by the plaintiff.

By those words the parties certainly could not have meant all claims, whether founded in right or not, which might be set up to the premises, but only such claims as in all human probability would be held paramount or superior to that of the defendants. Instruments of writing must be interpreted so as to carry into effect the intention of the parties, and in ascertaining that intention, and construing the language employed by them, it is often necessary to resort to those known philosophical principles which in general govern the conduct of rational beings. All men have some degree of prudence in their nature, and are not disposed to place their rights at the disposal of the public, or to surrender their property to the first person who may make a claim to it, without a show of right. If we accord to the plaintiff even that ordinary prudence and discretion which men usually exhibit in transactions of this character, we cannot conclude that he intended to bind himself to relinquish his right to a third of the purchase money of his property if any adverse claim, whether founded in right or not, should be set up to the premises. Neither can we believe that the defendant would have required anything so unreasonable from the plaintiff. Clearly, the thousand dollars was retained as security for the defendants against any valid or substantial right or title which, within six months from the time of the conveyance, they might be compelled to discharge.

It is evident, therefore, that, to make the defense good, the defendants should have shown that the claim or title which they purchased was a substantial and valid one. This was not done, and hence we must affirm the order of the Court below granting the plaintiff a new trial.

It is so ordered.

Lehane v. Keyes.

MORTH LEHANE, RESPONDENT, v. E. W. KEYES,
APPELLANT.

An answer palpably frivolous, or not verified when it should be, may be stricken out on motion, and if, after a reasonable time given to perfect such answer, it is not done, judgment may be rendered in accordance with the prayer of the complaint.

It being apparent that the appeal was taken simply for delay, five per cent. upon the judgment was awarded to the respondent as damages.

APPEAL from the District Court of the First Judicial District,
Hon. C. BURBANK presiding.

The facts appear in the Opinion.

Mitchell & Hundley, for Appellant.

Francis L. Aud, for Respondent.

Opinion by LEWIS, J., full Bench concurring.

The complaint in this action is upon a promissory note executed by the defendant and made payable to the plaintiff or his order. The defendant in the Court below filed a general demurrer to the complaint, and at the same time put in what counsel was pleased to call an answer, the substance of which, however, is that he had no answer to make. He "avers that he cannot answer the complaint because the same does not contain nor purport to contain a copy of the instrument or note sued on." The demurrer was overruled by the Court below, and upon motion of counsel for plaintiff the answer was very properly stricken out, and after a delay of five days—granted at the request of the defendant—judgment was rendered in accordance with the prayer of the complaint. The plaintiff's motion to strike out was based upon two grounds: first, because the answer was not verified as required by the Practice Act; and second, because it was frivolous, presenting no defense to the plaintiff's right to recover.

Either of these grounds, it seems to us, was sufficient to justify the Court in sustaining the motion. The answer is so palpably and unmistakably frivolous that we cannot see how the Court below could possibly have refused to strike it out. From the judgment thus rendered in favor of the plaintiff, the defendant takes an appeal

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to this Court, which it seems to us was taken more for the purpose of delay than to secure the ends of justice. Such being the case, we deem it our duty to award the plaintiff five per cent. on the amount of the judgment, as damages for the delay which has thus been occasioned.

It is so ordered.

SPARROW & TRENCH, APPELLANTS, v. C. L. STRONG
ET AL., RESPONDENTS.

The Supreme Court of the State of Nevada is the successor to the Supreme Court of the Territory of Nevada, and has the same control over the records of the late Supreme Court in all cases where anything remains to be done, that it has over its own records.

Courts of record may always amend a clerical error in a judgment or order at a subsequent term, when the error is shown by the record, and there is no necessity to resort to other evidence than is afforded by the record to correct the error.

There is great conflict of authority as to whether an inferior Court can amend its record whilst the case is pending, on writ of error in a superior Court. *Held*, that the pendency of the writ of error is not an impediment to the amending of the record so as to correct clerical errors.

In the event the Supreme Court of the United States should hold that the appeal from the order denying the motion for a new trial was never acted on by the Territorial Court, we have no hesitation in saying this Court would be governed in its future action by such opinion.

By Justice BROSNAN, dissenting.—The pendency of the case in the Supreme Court of the United States supersedes all action upon the part of this Court, except in obedience to the mandate of the superior Court. The application for amendment of the judgment should have been made in that Court.

THIS was a motion made in the Supreme Court of the State of Nevada to correct what was alleged to be a clerical error in a judgment entered up in the Supreme Court of the Territory of Nevada. The other facts necessary to understand the points decided are stated in the opinion of the Court.

C. J. Hillyer, for the motion to amend on behalf of Respondents.

This Court is the successor to the Territorial Supreme Court. (Constitution of Nevada; Laws of the United States, Vol. 13, p.

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441; *Freeborn v. Smith*, 2 Wallace, 160; *Hastings v. Johnson*, 2 Nevada.)

The clerical error in the judgment is apparent on its face, and should therefore be corrected. (*Balch v. Shaw*, 7 Cushing, 282, 8 Cush. 315; *Close v. Gillespey*, 3 John. 526; *Sharpe v. Fowler*, Littell's Selected Cases, (Ky.) 447; 17 Pick. 169; *O'Connell v. Miller*, 11 Ill. 57; *Short v. Kellogg*, 10 Georgia, 180; *Hudson v. Hudson*, 20 Ala. 364; *Hill v. Hoover*, 5 Miss. 386; 1 Pick. 353; 5 Burrow, 273; 2 Strange, 908; 2 Cowen, 408; Vol. 1 Bacon's Abridg. p. 251 *et seq.*; *Waldo v. Spencer*, 4 Conn. 71.)

The pendency of the writ of error is no impediment to this action. (Bacon's Abridg. Vol. 6, page 25; Bacon's Abridg. Vol. 1, 256; *Weed v. Weed*, 25 Conn. 357; *Tillotson v. Cheetham*, 3 John. 95; *Tillotson v. Cheetham*, 4 John. 499; *Rew v. Barker*, 2 Cowen, 408; *Holmes v. Remson*, Id. 410; *Cooper v. Bissel*, 15 John. 316; *Clark v. Lamb*, 8 Pick. 414; *Hutchinson v. Crossen*, 10 Mass. 250; *Rowell v. Bruce*, 5 N. H. 381; *King v. Anthony*, 2 Blackford, 131; *Smith's Ex. v. Todd's Ex.*, 3 J. J. Marshall, 299; *Boyle v. Connelly*, 2 Bibb, 7.)

This Court alone has the power to make the amendment.

Williams & Bixler, in opposition to the Motion.

This record belongs to the United States, and can only be transferred to the control of the State Courts by the united action of the State and Congress. This has not been done. (See *Hastings v. Johnson*, 2 Nevada Repts.)

The Constitution and Legislature of this State have never given this Court jurisdiction over any case like this, finally determined in the Supreme Court of the Territory, and then taken by writ of error to the Supreme Court of the United States. The Constitution and laws have only given jurisdiction in cases pending and undetermined in the Territorial Courts.

Even if the Territorial Court was still in existence, and this motion was made in that Court, it could not make the order. The appeal suspended all proceedings in the lower Court. (*Ford v. Thompson*, 19 Cal. 119; *Thornton v. Mahoney*, 24 Cal. 584.)

The inferior Court cannot be allowed by its action to defeat or

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render nugatory the action of the Appellate Court. (*Rew v. Barker*, 2 Cowen, 408 ; *Cheetham v. Tillotson*, 4 John. 506 to 509.)

Even if the Court had jurisdiction of the subject, and there was no appeal, still this correction could not be made. Courts, after the expiration of the term, can only correct clerical errors, and that when there is something in the record to correct by. (1 Bacon Abridg. Title Amendment, [F] and [G] pages 251 to 258 ; *Morrison v. Ramirez*, 3 Cal. 256 ; *Branger v. Chevalier*, 9 Cal. 352 ; *Smith v. Brannan*, 13 Cal. 115 ; *DeCastro v. Richardson*, 25 Cal. 53 ; *Hegeler v. Heuckell*, 27 Cal. 492 ; *Adkinson v. Stevens*, 7 J. J. Marshall, 237 ; *Waldo v. Spencer*, 4 Conn. 71 ; *Judson v. Blanchard*, 3 Conn. 584, and cases there cited in the brief of counsel and opinion of the Court ; and *Bank of United States v. Moss*, 6 How. U. S. 39.)

No amendment can be allowed to cure defective action of the Court. (*Balch and Wife v. Thare*, 7 Cushing, 282.) It is sought here not to correct a clerical error, but to correct the judgment of the Court.

Opinion by BEATTY, C. J., LEWIS, J., concurring.

In this case there is an application made to us by respondent to correct what is alleged to be a clerical mistake in entering up a judgment of the Supreme Court of the Territory of Nevada, rendered in 1863.

There are various objections made by appellants to our granting the relief sought by the motion. Appellants contend that this Court is not the custodian of the records of the late Territorial Court ; is not the successor of that Court, and has no jurisdiction over the parties to the record. In the case of *Hastings v. J. Neely Johnson*, (2d Vol. of Nevada State Reports) lately decided by this Court, we held that the State Courts had jurisdiction to hear and determine causes left pending in the Territorial Courts at the time of the transition from a Territorial to a State Government. But it is said that a case which was finally decided in the Supreme Court of the Territory and taken by writ of error to the Supreme Court of the United States, was not pending in the Territorial Courts at the time of change of Government ; that so far as these Courts were concerned, the case was finally disposed of ; that the Ter-

ritorial Court had no longer anything to do with the case, and therefore, admitting we are in any sense the successors of that Court as to all unfinished business, this case does not come under that class of cases.

In this last proposition appellants are clearly wrong. Whenever the case is disposed of on the writ of error, a mandate will, according to the regular course of practice in the United States Supreme Court, issue to some tribunal to carry the orders of that Court into effect. That Court has decided, where there is no inferior tribunal to which they can issue their mandate, they will not hear a case on writ of error, because their judgment in such case would be nugatory and incapable of being enforced. (See *Hunt v. Palao*, 4 Howard, 588.) Then, in the case under consideration, if the Supreme Court of the United States either affirms or reverses it, that Court will send its mandate to some inferior Court. As the Territorial Court has ceased to exist, this is the only Court to which such mandate can be sent. That it will be sent to this Court we may safely infer, from the fact that in the case of *Freeborn v. Smith*, (2 Wallace, 160) the Supreme Court of the United States did send its mandate to this Court in a precisely similar case.

It would seem, then, in any event, that something more is to be done in this case after the decision of the case on the writ of error, and the mandate to do what is necessary will be sent to this Court.

The Act of Congress of February 27th, 1865, providing for a District Court in the State of Nevada, and other things, clearly provides that this Court shall be the successor to the Supreme Court of the Territory of Nevada, in cases of this kind. Our Constitution provides we shall be the successors to that Court in all *pending* cases. The term "pending cases," as we understand it, in this connection, includes all cases in which anything remains to be done, and therefore includes this case. We think it may fairly be inferred from the decisions of the Supreme Court of the United States, in the cases of *Hunt v. Palao* and *Freeborn v. Smith*, just referred to, that the same view of our Constitution and the law of Congress is entertained by the Supreme Court of the United States. Jurisdiction is conferred on this Court as the successor of the late Supreme Territorial Court, by the concurrent act of the State authorities and the Congress of the United States. Under such

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authority we hold that we have the same control over the records of that Court that we have over our own, in all cases where anything remains to be done.

The next question to be determined is, whether we shall make the correction asked for? And in regard to this point, two things are to be considered: First, is it proper that the amendment asked for should be made, provided the pendency of the writ of error is no impediment to our action in the premises? and, second, does the pending of that writ in a Court of higher jurisdiction deprive this Court of the power to make corrections in the record which would be otherwise proper?

With regard to the powers of Courts to correct their records after the expiration of the term at which the record is made up, and as to the character of the evidence which will be received to guide the Court in such corrections, there is much conflict of opinion.

But on one proposition there is perfect unanimity among all Judges, Courts, and, we may say, well informed lawyers. The Court will at all times correct a mere clerical error, which can be corrected from the record itself. This, it appears to us, is precisely one of those cases. The plaintiffs and appellants had an action at law pending in the First District Court of the Territory of Nevada for certain mining ground. The case was tried, and verdict of jury for defendants. Plaintiffs asked for a new trial, and on the refusal of the Court below to grant a new trial, plaintiffs filed the following notice:

“Take notice that the plaintiffs in the above entitled action appeal to the Supreme Court of this Territory from the order made in this cause on the thirteenth day of November, A.D. 1862, by the District Court of the First Judicial District overruling the plaintiffs’ motion for a new trial, argued and submitted at the May term of this Court, to which ruling plaintiffs duly excepted.”

Upon the service of this notice, the filing of the necessary undertaking, etc., the transcript was made out and the case brought before the Supreme Court of the Territory for hearing. Now it is evident the only question brought before the Supreme Court for its adjudication was the question as to whether the First District Court was right, or committed an error in overruling the motion for new trial.

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After the case was argued and submitted on this record, the Court filed the following opinion or order: "Ordered that the judgment of the Court below in this cause be affirmed, with costs." The Clerk, in writing up the judgment, in supposed conformity to the opinion, entered it in the following manner:

"Now, on this day, the cause being called, and having heretofore been argued and submitted and taken under advisement by the Court, and all and singular the law and the premises being by the Court here seen and fully considered, the opinion of the Court herein is delivered by Turner, C. J., Mott, J., concurring, to the effect that the judgment of the Court below be affirmed.

"Whereupon it is now ordered, considered, and adjudged by the Court here, that the judgment and decree of the District Court of the First Judicial District, in and for Storey County, be and the same is hereby affirmed with costs."

To our mind it appears evident the clerk did not carry out the intent of the Court as expressed in the written opinion or direction filed.

The Court order the "judgment of the Court below in this case" to be affirmed. Now, what judgment could the Court refer to but the judgment appealed from? It did not mean to affirm all judgments between the parties named at the head of the order, nor any judgments between the said parties, but the one appealed from. The only judgment appealed from was the *judgment*, "judicial determination," or order of the Court refusing a new trial. And this was the only judgment referred to by the Court. The first paragraph of the judgment, as entered up by the Clerk, read well enough, but in the second, some change should have been made to conform to the evident meaning of the order signed by two of the Judges of that Court. The words "and decree" should have been omitted, and after the word "county" the following words should have been added: "overruling the motion for a new trial." The judgment would have then read: "Whereupon it is now ordered, considered, and adjudged by the Court here, that the judgment of the District Court of the First Judicial District, in and for Storey County, overruling the motion for a new trial, be and the same is hereby affirmed with costs," which would have clearly expressed the intention of the Court.

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The Territorial statute then in existence, it is true, defined a judgment and an order and drew a distinction between them. And it would have been more in consonance with the statute if the Supreme Court had said the *order* of the Court below in this case is affirmed. But if they had expressed the same idea in other language, it would have been equally binding. The word "judgment" usually means either the final determination or the record expressing the final determination of a Court as to the rights of parties litigant in a common law action. The statute clearly points out the distinction between the word "judgment" when used in this sense and the word "order."

The judgment of a Court sometimes only means the judicial determination of a disputed fact or contested point of law. In the order filed by the Court in this case it was used in this latter sense. Nothing is more common in Courts than for a Judge to make a short order directing the Clerk to enter judgment. The Clerk is then guided in entering the judgment by the order of the Court and the record in the case. For instance: a Judge says to the Clerk, either orally or in writing, "Enter the judgment for plaintiff for the amount sued for." The Clerk must of necessity look to the complaint to see how or for what amount he must enter judgment. So in this case, the Clerk should have been guided by the order of the Court and by the record showing the nature of the appeal.

Although there is some conflict of opinion as to whether an inferior Court can amend the record whilst a case is pending upon writ of error in a higher Court, we are inclined to think that the weight of authority is in favor of the proposition that the pending of such writ does not prove an impediment to the action of the Court below. And we come the more readily to this conclusion because if we are wrong, the Supreme Court of the United States will disregard any order we make in the premises. If we are to err, it is better to err on that side where there is a remedy than where there is none.

It has been suggested by the counsel for the appellants that possibly the Supreme Court of the United States may decide that the appeal pending in the Territorial Supreme Court has never been decided. That the judgment of that Court affirming the "judgment and decree" of the lower Court was not an affirmance of the order denying the motion for a new trial. That if such be the case, and the

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amendment asked for here should be made, plaintiffs would lose a hearing on the merits, both in this Court and the United States Court. In the one, because the case *had not* been decided in the Territorial Court, as appeared by the original record; in the other, because it *had* been decided there, as shown by the *amended* record. We have no hesitation in saying we would be governed by the decision of the United States Supreme Court in this matter. If that Court should hold that there has been no decision on the order appealed from, we will be guided by that ruling and proceed to hear the appeal on its merits. Whilst we will make the order amending the record, we will also provide in that order that in case the Supreme Court of the United States shall have decided or shall hereafter decide that there has been no adjudication of the appeal in this case by the Territorial Supreme Court, the appellants in this case may move to set aside the order making the amendment to the record and to place the case on the calendar for hearing.

It is therefore ordered that the judgment heretofore entered by the Supreme Court of the Territory of Nevada be so amended as to read as follows:

"Sparrow & Trench v. C. L. Strong et al.—Now on this day, this cause being called, and having been heretofore argued and submitted and taken under advisement by the Court, and all and singular the law and the premises being by the Court here seen and fully considered, the opinion of the Court herein is delivered by Turner, C. J., Mott, J., concurring, to the effect that the judgment of the Court below be affirmed. Whereupon it is now ordered, considered, and adjudged by the Court here, that the judgment of the District Court of the First Judicial District, in and for Storey County, overruling the motion for a new trial, be and the same is hereby affirmed with costs." It is further ordered that the appellants may hereafter move to set this order aside, in case it shall have been held or shall hereafter be held by the Supreme Court of the United States that the point on appeal to the Territorial Court in this case has never been decided.

Dissenting opinion by BROSNAN, J.

In view of the circumstances surrounding this case, I am unable to concur in the opinion of my associates. The reason of my dis-

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sent is, that the appeal taken to the Supreme Court of the United States (which appeal is admitted to have been perfected in strict compliance with law and precedent) suspends all proceedings in this Court pending such appeal, except as this Court may be moved and empowered to act in the premises in obedience to mandate from the appellate tribunal. The application, in my opinion, should have been made before the Court now having the case in charge.

S. C. FUGITT, PETITIONER, v. L. D. COX, RESPONDENT.

PETITION FOR MANDAMUS.

The filing of a notice of appeal and undertaking on appeal in a Justice's Court after the rendition of a verdict by the jury, but before the entry of judgment thereon, does not deprive the Justice of authority to enter up judgment on the verdict.

A Justice should enter up judgment immediately on the rendition of a verdict. But if he omits to do so the day the verdict is rendered, still he may complete his record by afterwards entering the judgment.

Daniel Virgin, for Petitioner.

No appearance for Respondent.

Opinion by BEATTY, C. J., BROSNAN, J., concurring.

This is a petition for a peremptory mandamus, based on affidavit in behalf of petitioner and the voluntary appearance of respondent.

Respondent is an acting Justice of the Peace. Petitioner was a defendant in an action pending in the Court of respondent.

The case was tried before a jury, and the jury rendered verdict for defendant. Respondent entered the verdict as rendered, and then, without entering a judgment thereon in favor of defendant, entered an adjournment of his Court. Thereupon the plaintiff gave notice of appeal, and filed his stipulation on appeal before any judgment was entered. Defendant then requested the Justice to enter up the judgment in his favor for costs of suit. This the Justice declined, because he doubted his authority to do so after appeal taken.

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The Justice should, properly, have entered judgment before the adjournment of the Court for the day. But, failing to do that, he should have done so as soon as his attention was called to the omission. The premature notice of appeal, filed before judgment was entered, could not deprive the Justice of the power to enter the judgment on the verdict.

A writ of mandamus will issue commanding the Justice to enter up judgment on the verdict.

There is other matter set forth in the petition, but we think this is not the proper way to reach anything demanded, except the entry of the judgment on the verdict.

THOMAS E. HAYDON, PETITIONER, *v.* BOARD OF SUPERVISORS OF ORMSBY CO., RESPONDENTS.

PETITION FOR MANDAMUS.

Sections four and five of the Act of March 12th, 1866, in regard to the consolidation and payment of the debts of Ormsby County, are ambiguous as to one point, and equally capable of either construction, as to whether there shall be paid out on bids for the surrender of County indebtedness, all money in the Redemption Fund when the bidding is closed, or only such money as is in the Fund the day an advertisement for bids is first published. The former construction being most beneficial to the public, will be adopted.

Thomas E. Haydon, for Petitioner.

S. C. Deason, District Attorney of Ormsby County, for Appellants.

Opinion by BEATTY, C. J., BROSNAN, J., concurring.

This was a petition for an alternative writ of mandamus. The respondents, by their attorney, the District Attorney of Ormsby County, entered their appearance, waived the issuance of the alternative writ, and submitted the cause to the Court on the facts as stated in the petition.

The proceeding is a friendly one, and the parties on both sides are anxious to have the opinion of this Court on the proper inter-

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pretation of two sections of the law passed and approved March 12th, 1866, for consolidating and paying the indebtedness of Ormsby County.

On the sixth of December, 1866, the Treasurer of Ormsby County inserted the following advertisement in the *Carson Appeal*:

“COUNTY TREASURER’S NOTICE.—Notice is hereby given that there is now in the Redemption Fund of Ormsby County four thousand five hundred dollars, and that sealed proposals will be received by the County Auditor of said County for the surrender of bonds, warrants, and claims payable out of said Redemption Fund; which proposals, inclosing or containing the bonds, warrants, and claims offered to be surrendered, will be received at the office of said County Auditor until Monday, the 7th day of January, A.D. 1867, at 10 o’clock A.M.

“JOHN WAGNER,

“County Treasurer, Ormsby County.”

Various bids were made by the holders of County indebtedness, and among the bidders was the petitioner. The sum of forty-five hundred dollars mentioned in the advertisement was exhausted by bids more favorable to the County than those of the petitioner. But between the time of inserting the advertisement and the time within which the bidding was to be closed, there had been an additional amount paid into this Redemption Fund. If this additional amount be distributed to the bidders, the petitioner will have his bids accepted.

The only question is, whether, when the bids were opened, the County Auditors and Commissioners should have accepted bids of sufficient amount to cover all the money in the Fund on the seventh day of January, 1867, or only such as was in the Fund on the sixth day of December, 1866, when the advertisement inviting bids was inserted.

The difficulty arises only on the construction of two sentences, one in the fourth section and the other in the fifth section of the Act. The doubtful language in the fourth section is as follows:

“That the Auditor of said County will receive sealed proposals for the surrender of bonds, warrants, and claims payable out of said

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Redemption Fund, *to the amount of his means to purchase*, as provided in this Act."

So far as this section is concerned, the whole question turns on the interpretation of the words we have italicised in the foregoing quotation. The point is, do they mean "to the amount of his means to purchase" with the funds on hand when he advertises for proposals? or the funds he will have on hand when the bids are opened? It appears to us the sentence is equally capable of either interpretation. The words in the fifth section are as follows:

"And the County Treasurer shall open said sealed proposals, and accept the lowest bids for the surrender of any warrants, bonds, or claims payable out of said Redemption Fund *to the amount of money in such Fund*."

The words italicised in the foregoing quotation are the doubtful words in this sentence. It may be contended that they also refer to the amount of money "in the fund" when the advertisement or proposal for bids is made. But it appears to us the more natural construction of this sentence is to interpret this latter clause as referring to the time when the bids are received. That is, up to the last hour for receiving bids. It does not have any such immediate connection with the advertisement as to require any connection between the time of this sentence and that of the advertisement. Certainly it is doing no violence to the language of this sentence to make the time refer to the time of opening or receiving the bids. We think this interpretation is probably the most convenient to the County, and may save it some expense by avoiding too frequent advertisements. The only possible objection to the convenience and utility of this construction is, that the Treasurer having barely five hundred dollars on hand, might insert his advertisement for bids, stating that fact. That between the day of inserting such advertisement and the day for opening bids he might receive many thousand dollars, and as only the comparatively small sum of \$500 would be mentioned as the amount on hand, bidders would be thus misled to the injury of themselves and the public.

There is certainly some force in this objection, so far as the policy of the matter is concerned. Still this objection may be in a great measure avoided. The law requires the Treasurer, where he has a sum exceeding five hundred dollars, to advertise for sealed pro-

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posals. That does not, of course, mean that at the precise moment the fund is on hand he shall send off his advertisement; but it would be a sufficient compliance with that clause if he inserted his advertisement at any time after the money came into the fund, and at least fifteen days before the next regular meeting of the Board of County Commissioners. Thus, if there was over \$500 in the fund at the beginning of any month, and he anticipated that a larger sum would soon be paid in, he could with propriety wait until the middle part of the month before inserting the notice in the paper, and still have it there in time for the funds to be distributed at the next regular meeting of the Board. So, too, after mentioning in his notice the amount of funds on hand, he could state the fact that other funds applicable to this purpose were expected to be received before the time for receiving bids would expire. The Court will not presume that the Treasurer will fail to use a reasonable discretion in the matter.

The law then being capable of either construction without doing violence to the language used, we will give it such construction as will be most beneficial to the public. We shall hold that the County officers authorized to act in the premises shall distribute all money in the Redemption Fund when the bidding is closed. A positive mandamus will issue in accordance with the prayer of the petition. As the officers acted here doubtless in good faith, and the law was ambiguous, no costs will be allowed either party, but each will pay their own costs.

O. F. GIFFIN *v.* H. MARTIN SMITH ET ALS.

Section 10 of an Act entitled "An Act relative to Sheriffs," (Laws of 1861, page 103) only refers to those cases where there is a wrongful withholding of the money collected by the Sheriff, and not where there is a mistake in its application, and it is shown that the Sheriff has not the money in his hands. It is not the policy of the law to inflict penalties upon its officers for mistakes or errors of judgment.

APPEAL from the District Court of the First Judicial District,
Hon. R. S. MESICK presiding.

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The facts appear in the Opinion.

Clayton & Clarke, for Appellant.

Hillyer & Whitman, for Respondent.

1st. The section of the statute on which appellant relies is unconstitutional and void; no Court has the power to enter such order as provided by the section—certainly not against the sureties of the Sheriff—they must have their day in Court.

2d. The only ground upon which the section referred to can be maintained is, that the Court may have power over its officer to make such order as that contemplated by the statute. Here the reason of the rule fails, as the motion is not made before the Court where the case was heard. Howard never was Sheriff of Storey County in the *State of Nevada*. He never was officer of the Court when the motion was made. The District Court for Storey County, State of Nevada, has no control over any case or matter, unless the same was pending at the time of change from Territorial to State condition.

3d. There is nothing in the record to warrant this Court in reversing the order of the Court below. There is no statement which this Court can consider. The opinion of the Court below is based upon two grounds. If either be correct, then the judgment must be affirmed. Admitting for the sake of argument that the Court below erred in the jurisdictional question, this Court must assume the correctness in questions of fact. Should this Court conclude to examine other portions of the record, it must still conclude that the Court below was correct, and its judgment borne out by the facts. The return of the Sheriff does not present such a case as that contemplated by the statute. There is no proof of fraud, or even of negligence. (*Egery v. Buchanan*, 5 Cal. 56; *Johnson v. Gorham*, 6 Cal. 195; *Wilson v. Broder*, 10 Cal. 486.)

4th. How can ten per cent. per month be collected off a Sheriff's sureties without their authority in writing?

Opinion by LEWIS, J., full Bench concurring.

Section ten of an Act entitled "An Act relative to Sheriffs," (Laws of 1861, page 103) declares that "If a Sheriff shall neg-

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lect or refuse to pay over on demand, to the person entitled, any money which may come into his hands, by virtue of his office, after deducting his legal fees, the amount thereof, with twenty-five per cent. damages and interest at the rate of ten per cent. per month from the time of the demand, may be recovered by such person from him and the sureties on his official bond, on application, upon five days' notice to the Court in which the action is brought, or the Judge thereof, in vacation."

Under this law the appellant Robert Robinson, moved in the Court below to recover from the Sheriff of the County of Storey and his sureties the sum of fifteen hundred and nine dollars and thirty-four cents, with damages and interest, as provided by the section above set out. The Court below refused the relief sought, and from that ruling this appeal is taken. The facts upon which this application is based are set out in the record as follows: "That in the above entitled action (*Giffin v. Smith*) an order of sale was issued out of the District Court of the First Judicial District, in and for the County of Storey, on the 15th day of May, A.D. 1863, directing certain property therein described to be sold by the Sheriff of Storey County, and that by virtue of said order of sale, W. H. Howard, the Sheriff, did sell at public auction the property therein described, on the sixth day of June, A.D. 1863, to O. F. Giffin, for the sum of eight thousand eight hundred and fifty-six dollars, which sum was paid by Giffin to the Sheriff; that this sum came into the hands of Howard by virtue of his position as Sheriff of the County of Storey; that out of the proceeds of the sale the plaintiff, Giffin, was entitled to receive only seven thousand and eighty-three dollars; that Kinkead and Harrington, who were parties to the judgment in this action, were entitled to receive from the Sheriff, out of the proceeds of the sale, the sum of one thousand and six dollars and twenty-three cents; and H. W. Johnson, who was also a party to judgment, was entitled to receive the sum of five hundred and three dollars; that the several sums which Kinkead and Harrington and Johnston were entitled to receive from the Sheriff, were demanded from him on the eighth day of June, A.D. 1863, but that he has refused and continues to refuse to pay the same; that the applicant, Robert Robinson, is the assignee of these several claims. These facts appear in the petition of the appellant. In other parts of the

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record we find the judgment authorizing the sale referred to, together with the Sheriff's return thereon, from which we are fully satisfied there was no such willful wrong or withholding of the money by the Sheriff as will sustain this proceeding against him and his sureties. The Court, in the action of *Giffin v. Smith*, rendered judgment in favor of the plaintiff for the sum of eight thousand four hundred and ninety-seven dollars and eighteen cents, besides costs.

The Court then orders the Sheriff to pay to the plaintiff out of the proceeds of the sale of the mortgaged property a sum "equal to the amount of the note described in the mortgage, said note being for five thousand dollars, and bearing date January 16, A.D. 1862, with interest thereon, from date until time of payment, at the rate of two and one-half per cent. per month, if the amount be sufficient to pay the plaintiff's judgment. The Sheriff shall pay two-thirds of the balance of the proceeds of sale (if there be any) to Kinkead and Harrington, to apply on their judgment against the defendants, and the other third to defendant Johnson."

In the Sheriff's return to the execution, he says: "I paid to plaintiff, O. F. Giffin, the sum of eight thousand five hundred and ninety-two dollars and sixty-six cents, in full satisfaction of the judgment and decree upon which this order was issued, except the lien of defendants and intervenors, Kinkead and Harrington, and the claim of H. W. Johnson, one of the defendants herein named, whose several claims are unsatisfied and unpaid."

The real amount due Giffin was but seven thousand and eighty-three dollars. Why the Court rendered judgment for the sum of eight thousand four hundred and ninety-seven dollars and eighteen cents, whereas the note shows he was only entitled to recover seven thousand and eighty-three dollars and thirty-three cents, we are not able to ascertain from the record. We are inclined to the belief, however, that the Sheriff was misled by this error in the judgment, for his return shows that the sum of eight thousand five hundred and ninety-two dollars was paid to the plaintiff, Giffin, which was the entire sum realized from the sale, except the Court costs.

Here there seems to be nothing to indicate a willful or wrongful withholding of money to which the appellant Robinson is entitled. It was evidently an error, and the return shows that the Sheriff has none of the money in his own hands. It remains, then, to be de-

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terminated whether the tenth section of the law referred to applies to cases of this kind. In our opinion it does not. The statute is highly penal in its character, and hence it could only be intended to cover cases where the officer willfully withholds money from those entitled to receive it. It is not the policy of the law to inflict a penalty upon its officers for mistakes or errors of judgment. It imposes punishments only for intentional and willful wrong, or the grossest carelessness. Its humanity is averse to the infliction of heavy penalties for errors where there is no intentional delinquency.

The Supreme Court of California, in the case of *Wilson v. Broder*, say of a proceeding of this kind: "This remedy was only given for cases of intentional delinquency on the part of the Sheriff, as a punishment for his willful or corrupt neglect of duty, and was not designed to embrace a case in which he declined to pay over money collected under circumstances of a *bona fide*, well grounded doubt of the authority of the party to demand it."

And in the case of *Egery et al. v. Buchanan*, 5 Cal., the Court, in a case arising under a similar statute, say: "It is urged that the Statute of this State, giving extraordinary damages against the Sheriff, for failing to pay over money collected on execution, has affected or altered the rule at common law. There is no reason for this position, and very strong reasons against it. The statute penalties are only recoverable when, by the return of the Sheriff, he admits the collection of the money, and refuses to pay it over. If it was otherwise, an error of judgment, or even a hesitation to decide between adverse claimants, might work the ruin of any honest and conscientious officer." (See also *Johnson v. Gorham*, 6 Cal. 195.)

These authorities are supported by the clearest principles of justice, and they clearly sustain the ruling of the lower Court.

As our conclusion upon this point disposes of the appellant's application, we do not consider it necessary to pass upon the other points raised on the record.

The order of the Court below is affirmed.

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ACTION.

1. If plaintiff own a promissory note he may sue on it, although it be in possession of defendant. *McClusky v. Gerhauser*, 47.

See ASSUMPSIT, 1-8.

BOND, 2.

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ADVERSE CLAIM.

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AGREEMENT.

1. Upon the conveyance of certain land and water privileges by W. to R. and J., an agreement was entered into, which declared that "Whereas, the said Railey and Johnson have paid two thousand dollars in cash to said Walter, and "there remaining unpaid one thousand dollars which is held as security "by said Railey and Johnson, to protect them from any adverse claim "which may be set up to said property, franchise or privilege, or any part "thereof, by any other person or persons; now, therefore, if the said Railey "and Johnson, their heirs or assigns, shall not within six months herefrom "have to pay for the release or discharge of any adverse claim against said "property or franchise, or have recovered against them any part or portion "thereof, then the said Railey and Johnson agree to pay to said Walter, his "heirs or assigns, the said sum of one thousand dollars in gold coin of the "United States, at the expiration of six months herefrom; otherwise, this "bond to be null and void." *Held*, that to release Railey and Johnson from the payment of the one thousand dollars, they must show that a valid and substantial claim was set up to the premises; and that to protect themselves, they were compelled to purchase, or extinguish it. *Walter v. Johnson*, 354.

2. "Adverse claim," in such an instrument, must be interpreted to mean such a valid and paramount title or right which, if asserted in Court, would divert the title granted by the plaintiff. *Id.*

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ALIMONY.

1. Under the statute providing for the payment of alimony *pendente lite*, the Court cannot make an order for the payment of past expenses after the suit has been finally decided against the wife, although the motion was made before the decision of the case. *Wilde v. Wilde*, 306.

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See STATUTES, 5, 6.

AMENDMENT OF RECORDS.

1. The Supreme Court of the State of Nevada is the successor to the Supreme Court of the Territory of Nevada, and has the same control over the records of the late Supreme Court in all cases where anything remains to be done, that it has over its own records. *Sparrow & Trench v. Strong*, 362.
2. Courts of record may always amend a clerical error in a judgment or order at a subsequent term, when the error is shown by the record, and there is no necessity to resort to other evidence than is afforded by the record to correct the error. *Id.*
3. There is great conflict of authority as to whether an inferior Court can amend its record whilst the case is pending, on writ of error in a superior Court. *Held*, that the pendency of the writ of error is not an impediment to the amending of the record so as to correct clerical errors. *Id.*
4. In the event the Supreme Court of the United States should hold that the appeal from the order denying the motion for a new trial was never acted on by the Territorial Court, we have no hesitation in saying this Court would be governed in its future action by such opinion. *Id.*
5. The pendency of the case in the Supreme Court of the United States supersedes all action upon the part of this Court, except in obedience to the mandate of the superior Court. The application for amendment of the judgment should have been made in that Court. By Justice BRONNAN, dissenting. *Id.*

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See CORPORATIONS, 3-6.

ASSUMPSIT.

1. The general rule of law is, that that which is in its inception a tort cannot be waived so as to support an action of assumpsit. *Carson River Lumbering Co. v. Bassett*, 249.
2. To enable a party to recover in assumpsit on implied promise, the plaintiff must establish such facts that a promise on the part of the defendant might reasonably be presumed from the transaction. No such promise can be presumed when the defendant commits a trespass under a claim of right. *Id.*
3. There are some cases in which the plaintiff may waive the trespass, and sue in assumpsit. One, when the trespasser sells the personal property of plaintiff and receives the money. Another, when the trespasser dies, and suit is brought against his personal representative. *Id.*

APPEAL.

1. An order setting aside a judgment by default is an appealable order, and if not appealed from, that order will not be reviewed after judgment on the merits. *Maynard v. Johnson*, 16.
2. A revenue stamp may be affixed to the notice of appeal even after motion to dismiss. When affixed, it renders notice operative from the time of filing. *Killip v. Empire Mill Co.*, 34.
3. The appeal here was properly taken from the order granting a new trial, rather than from the order allowing notice to be filed *nunc pro tunc*. *Id.*
4. It is not necessary to appeal from a void order which can have no operation or effect. *Id.*
5. A defective finding of facts is not a ground for reversing a judgment when that defect is not noticed or complained of in the Court below. *McClusky v. Gerhauser*, 47.
6. The Supreme Court will not reverse a judgment unless error affirmatively appear. *Nosler v. Haynes*, 53.
7. Supreme Court will reverse void as well as erroneous judgments. *Hastings v. Burning Moscow Co.*, 93.
8. *Query*—Whether the Supreme Court, on reversing a judgment, may also order a sale under execution to be set aside?

9. The cost bill is no part of the judgment roll, and where there is no statement or bill of exceptions, we cannot pass on its correctness. On a mere appeal from a judgment we cannot review any error which might occur in refusing to sustain a motion made, after the appeal was perfected, to strike out the cost bill. *Howard v. Richards & Richards*, 128.
10. The mistake in the calculation of the amount for which judgment should have been rendered, should have been corrected by motion in the lower Court. *Id.*
11. Appellant having failed to make the application in that Court, we will correct it here, but impose the costs on the appellant. *Id.*
12. Where costs are improperly inserted in a judgment, it is the proper practice to move in the Court below to strike them out. But if that motion is denied, the appeal is from the judgment which is erroneous; and not from the order of the Court below refusing to correct the error. Per BEATTY, J. *Howard v. Richards & Richards*, 128.
13. Appeals from orders after judgment are allowed, not to correct erroneous judgments, but to correct some erroneous proceeding subsequent to and founded on a good judgment. *Id.*
14. Section 284, of Practice Act, directs that certain papers shall be brought up on appeal; it does not in express terms prohibit other papers from being brought up. *Id.*
15. The Constitution gives this Court the trial of cases on appeal, and the Legislature could not, if it would, deprive the Court of the power of examining such portions of the record as are necessary to determine all appeals. *Id.*
16. The Legislature never intended to deprive this Court of the power to examine bills of exception and other parts of the record which are not mentioned in the two hundred and eighty-fourth section of the Practice Act. *Id.*
17. We must look into the record to see if there is any foundation for a judgment appealed from. As the filing of a cost bill is the only thing that gives jurisdiction to enter up a judgment for costs, we must look to the record to see if any such bill has been filed, and if an examination of the cost bill filed shows error in the judgment for costs, that error must be corrected. *Id.*
18. There being nothing in the record on which this Court could act in setting aside the alleged sale under an erroneous judgment, the appellant must seek his remedy by motion in the Court below. *Miller v. Cherry*, 165.
19. This Court cannot reverse a judgment for want of sufficient evidence to sustain the verdict, unless the record shows that all the material evidence is before us. *The State v. Bonds*, 265.
20. To enable this Court to reverse an order of the District Court, the error complained of must affirmatively appear. All presumptions are in favor of the regularity of the proceedings in the Court below. *Champion v. Sessions*, 272.
21. It is not right to compel the unsuccessful party in this Court to pay the costs of appeal as a condition precedent to making his defense in the Court below. *Gallagher v. Dunlap*, 326.
22. Oral evidence is not admissible to show error in the proceedings of the Court below. *Ex Parte Smith*, 338.
23. The judgment of an inferior Court will not be set aside on appeal, for errors committed on the trial which it appears could not have prejudiced the appellant. *Mitchell v. Bromberger*, 345.

24. When a cost bill appears regular on its face, and there is nothing in the record to show error in any of the items charged, the refusal of the Court below to retax the costs must be presumed to be correct. *Id.*
25. It being apparent that the appeal was taken simply for delay, five per cent. upon the judgment was awarded to the respondent as damages. *Lehane v. Keyer*, 361.

See CONSTITUTIONAL LAW, 10.

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ATTACHMENT.

1. Whether the statement in an affidavit that affiant has been informed that defendant has sold certain teams, wagons, etc., with intent to defraud his creditors, is a sufficient compliance with that part of the Statute which requires the facts to be recited on which affiant's opinion is based, before the issuance of the attachment: Query? *Bowers v. Beck*, 139.
2. Where a debtor tells a creditor that he has disposed of all his property, and will pay when he gets ready, it creates a strong suspicion of fraud, and is a sufficient foundation for a belief in the creditor's mind that a fraud has been committed. *Id.*
3. If there is some evidence to justify the belief on the part of an attaching creditor that fraud is contemplated or has been committed, he may sue out an attachment. *Id.*
4. On the trial, that fraud may or may not be established; but if plaintiff fails on the trial to establish the fraud, still the issuance of the attachment was not a void act. *Id.*
5. Great strictness in the form of the affidavit should not be required. The defendant is protected by bond. *Id.*
6. Where property is attached, the attaching creditor gives bond for damages. The debtor is in no imminent peril of losing his property. *Id.*
7. There is nothing in the policy of the law to forbid a bond, given to release property from attachment, being enforced according to the very letter of its condition. *Id.*
8. *Caldwell v. Colgate* and others, 7 Barbour, S. C. Reports, and *Homan et al. v. Brinkerhoff*, 1 Denio, 184, denied to be law. *Id.*
9. The rule laid down in *McMillan v. Dana*, 18 Cal. 339, contains the true rule. *Id.*

10. The affidavit on which the attachment in this case was issued, met the requirements of the Statute. *Per BROSNAN, J. Id.*

See BOND, 1-13.

SURETY.

ATTORNEY AT LAW.

1. An attorney or counselor cannot, without the consent of his client, be compelled, and has no right, to disclose any fact which may have been communicated to him by his client, solely for the purpose of obtaining his professional assistance or advice; but this rule is not to be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. *Mitchell v. Bromberger*, 345.
2. Whenever, in a suit between the attorney and client, the disclosure of a privileged communication becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his own protection. *Id.*

See SURETY.

BILL OF EXCEPTIONS.

1. As a general rule, bills of exception once signed and filed, become a part of the record. Whether in case of mistake in stating fact they may, after term expired, be in any case corrected: Query? *Bowers v. Beck*, 139.

See BOND, 11.

BILL OF EXCHANGE.

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See MINING CLAIMS, 6.

BOND.

1. A bond given to release property taken under a writ of attachment is a bond given in a legal proceeding, and does not require a stamp. *Bowers v. Beck*, 139.
2. Where a bond is given for the use of a party to an action, but is in the hands of an officer of the Court, the beneficiary of the bond may bring suit thereon before the bond has come into his possession. *Id.*
3. What is recited in a bond to be true, is taken as true against the obligor, and need not be averred or proved. *Id.*
4. It is only necessary to make averments and proof as to what was done after the execution of the bond, and as to the breaches thereof. *Id.*
5. The Courts, in construing a bond, cannot interpolate into it conditions it does not contain. *Id.*
6. Where a bond for a release of goods under an attachment is conditioned for payment, if judgment is rendered against the owner of the goods attached, it becomes absolute upon the rendition of judgment whether the attachment is or is not sustained. *Id.*

7. The dismissal of an attachment operates as a complete release of the sureties on the bond for release of attached property. Per *Lewis, C. J.*, dissenting. *Id.*
8. When a plaintiff fails to show his case is one of those in which an attachment is authorized to issue, he is not entitled to the benefit of the lien created by the attachment. Why should he be more entitled if defendant overturns his *prima facie* case, on which it was issued? *Id.*
9. If the attachment is discharged, the property attached is necessarily released; so, too, if the attachment is held to have been improperly issued, the bond must become unavailable. *Id.*
10. A bond given to release property illegally attached, may be held as one given under duress of property. *Id.*
11. The bill of exceptions shows the order dismissing attachment in former case was introduced. However irregularly that order was brought before the Court, it is good defense, and must be considered in disposing of the case. *Id.*
12. The principal in the attachment bond should have been made a party defendant. *Id.*
13. Whether the debt on which the attachment, in *Bowers v. Atkinson*, was one on which an attachment might legally issue or not, is wholly immaterial. The bond recites that the goods to be released were attached; the obligors cannot contradict that recital. Per *Beatty, J.* *Id.* 157.
14. The clause in the Stamp Acts of the State and United States which exempts from stamp duty those bonds which are "required in a legal proceeding," is not confined to those bonds without which no action could be maintained or prosecuted, but is more general, and means all bonds *required* to give either party to a legal proceeding any advantage or privilege, to which he would be legally entitled in the course of that proceeding upon the execution of a proper bond. *Id.*

See AGREEMENT, 1, 2.
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CASES AFFIRMED.

McMillan v. Dana, 18 Cal. 339.

CASES OVERRULED.

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CERTIFICATE OF SALE.

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CERTIFICATE OF REGISTER OF LAND OFFICE.

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CERTIORARI.

1. Upon a return to a writ of certiorari, this Court can only inquire whether the

tribunal certifying its proceedings has, or not, exceeded its jurisdiction. *Maynard v. Railey*, 313.

CHALLENGES.

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CONSTITUTIONAL LAW.

1. Section 8, Article VIII, of the Constitution, requiring the Legislature to pass a general law for the organization of cities and towns, is inoperative until acted upon by the Legislature. *City of Virginia v. Chollar-Potosi G. & S. M. Co.*, 86.
2. Such sections, if standing alone, and not qualified by any other section of the Constitution, might raise a strong implied prohibition against the Legislature passing any special laws on the same subject. *Id.*
3. Section 1, Article VIII, by much stronger implication, seems to reserve to the Legislature the power to pass special laws in regard to municipal corporations: that is, to create them; or, at least, to confer special and additional powers after they are in existence. *Id.*
4. The City of Virginia was a municipal corporation when the Constitution was adopted, and has never ceased to be a corporation. *Id.*
5. The law amending the charter is, therefore, constitutional. *Id.*
6. The products of mines are personal property, and as such subject to taxation for municipal purposes. *Id.*
7. All property within the municipality is subject to one annual taxation, and it makes no difference that it is removed beyond the corporate limits before the amount of tax is specified, or the mode of collecting established. *Id.*

8. The Constitution requires that all *ad valorem* taxes shall be as nearly equal as may be. We cannot see that the mode of assessing the products of mines violates that principle of equality. *Id.*
9. The municipal authorities of the City of Virginia may add a penalty for refusing to give the Assessor proper information to enable him properly to assess the products of a mine. *Id.*
10. Under the provisions of Section 8, Article VI, of the Constitution, the Legislature may prescribe the mode of proceeding on appeal from a Justice's Court to the District Court. That mode may be by trial *de novo*, or a mere review of the Justice's proceedings, as the Legislature choose to direct. *Cavanaugh v. Wright*, 166.
11. The Act of the Territorial Legislature granting exclusive privileges to plaintiff's assignors was a valid constitutional Act. The grantees under that Act complied with the conditions precedent. *Carson River Lumbering Co. v. Bassett*, 249.

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See STATUTES.

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See CRIMINAL LAW, 23.

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See CRIMINAL LAW, 21, 22.

CORPORATIONS.

1. When one deeds all his interest, say one hundred and thirty-seven and one-half feet, in a mining company to Trustees, to form a corporation, in trust that he is to receive shares in the corporation in lieu of the feet, and afterwards conveys the same feet with covenants of warrantee to another party, the last grantee takes an equity and is entitled to the shares to be issued in lieu of these feet. *O'Meara v. North American Mining Co.*, 113.
2. When Trustees of a mining company issue stock to the party equitably entitled, the Court will not compel them to issue to another, especially when that other can only show his claim by establishing his own fraud. *Id.*
3. When an association of individuals formed to carry on a certain business, contracts debts, and afterwards the association is converted into a corporation, the same individuals who formed the joint stock association becoming corporators to continue the same business, the corporation may be liable for the debts of the association. *Paxton v. Bacon Mill & Mining Co.*, 257.
4. But when a corporation is formed, the capital or incorporate property of which is composed partly of the property of a pre-existing association and partly of

property contributed by corporators who had no connection with the previous association, the corporation is not bound for the debts of the late association. *Id.*

5. The stock of the former associates would be liable for the debts of that association. But the creditors of that association would have no claim on the corporate property, or the stock of those corporators who were not connected with the original association. *Id.*
6. When there is an agreement between all the parties about to incorporate, that the corporation shall assume all the debts of the prior association; or when, after incorporation, the corporate body assumes all the debts of the old association, undoubtedly this would enable the creditors to maintain *assumpsit* against the corporation. *Id.*

COST BILL AND COSTS.

1. Cost bill in this case held to be filed within two days after "the decision of the Court." *Sholes v. Stead & Hunt*, 107.

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COUNTY COMMISSIONERS.

1. The Act creating a sinking fund for Douglas County, and regulating the mode of advertisement for and receipt of bids "until the next regular meeting of the Board of County Commissioners of said county thereafter," does not authorize the receipt or consideration of a bid filed with the Treasurer on the day of the next regular meeting, but at a time subsequent to the meeting and adjournment for that day. *Brumfield v. Commissioners of Douglas County*, 65.
2. The Board of County Commissioners is not a Court, as Courts are defined in the Constitution. And such bodies may lawfully meet and transact business on the first day of January. *Id.*

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CRIMINAL LAW.

1. The sections of the Criminal Practice Act which require the Sheriff to make return of the venire issued for the trial jurors at least two days before the commencement of the term—that the Judge and Assessor shall make certificate of the names drawn by them to act as jurors, and the section requiring

the Judge and Assessor to select the names of two hundred persons, *lawfully qualified to serve as jurors*, are only directory. A judgment will not be reversed for a failure to strictly comply with those sections, unless it shall appear that the defendant may have been injured by such failure. *State v. Squairree*, 226.

2. It was not the intention of the Legislature to require the Judge and Assessor to pass on the qualifications of each person in selecting names out of which to form a jury. *Id.*
3. The names should be selected from the assessment roll. As to the qualifications of those selected, that could not be passed on at the time of selection. *Id.*
4. The failure to return the panel at the time required could not prejudice the defendant, if he had ample time after the return to inspect the panel. *Id.*
5. All the three sections referred to are qualified by Section 323 of Criminal Practice Act. *Id.*
6. This Court cannot review the action of the Court below in disallowing a challenge for cause when the party objecting makes no specification as to the nature of the objection upon which he interposes the challenge. The party challenging should specify the grounds of his challenge. *Id.*
7. It is error to allow a jury to disperse after impanelment without the consent of the prisoner. But a jury is not properly impaneled until they are sworn and charged with the case. *Id.*
8. When an instruction is asked and refused, which contains a correct principle of law, but there is nothing in the record showing its applicability to the case on trial, this Court cannot reverse the judgment. The refusal may have been on the ground that there was nothing in the testimony making the instruction applicable to the case. *Id.*
9. One may be principal in the crime of arson who does not himself apply the torch; if he be present aiding and abetting, he is a principal. An instruction which assumes that the defendant could only be principal if he himself set the fire is erroneous, and should not be given. *Id.*
10. When a party draws a pistol with the avowed intention of killing another, third parties interfere to prevent the threat being carried out; the pistol goes off, and the party threatened is killed; the natural presumption would be that the defendant had succeeded in carrying out his intention, notwithstanding the interference. If the defendant claims that the pistol went off accidentally in the scuffle with the bystanders who interfered to prevent the shooting, it lies on him to present some proof of that fact. *State v. Bonds*, 265.
11. Evidence of threats made by defendant may be proved not only to establish the killing, but when the killing is admitted, for the purpose of establishing motive or deliberation. *Id.*
12. When a threat is made against a party, unless he will do something which he fails to do, and the threat is afterwards executed, it would seem to be as conclusive as if it had not been connected with a condition. *Id.*
13. If the threat was made only conditionally, and the party threatened afterwards complied with the condition, this would, to a great extent, rebut the presumption arising from the threat. *Id.*

14. There is no such crime known to the law as an *attempt* to commit embracery. Embracery is itself but an attempt to do a wrong. There can be no indictment for an *attempt* to attempt. *State v. Sales*, 268.
15. To attempt to commit a crime is itself a crime at Common Law; but this cannot apply to the crime of embracery. *Id.*
16. It is also a crime at Common Law to solicit another to commit either a felony or misdemeanor; and whatever is a crime at Common Law is punishable under our statute. It is a crime to solicit another to commit embracery. It is a crime in A to solicit B to attempt to corrupt a juror. *Id.*
17. There is no statute requiring a District Attorney to sign an indictment. But even if his signature is necessary, still if that officer does sign it, and instead of signing "H., District Attorney of Douglas County," signs "H., Prosecuting Attorney of the 8th Judicial District," (Douglas County composing that District) it is well. *State v. Salge*, 321.
18. When a prisoner has pleaded "not guilty," it is in the discretion of the Court whether, or not, to allow him to withdraw that plea to interpose another. *Id.*
19. The prisoner has, however, an absolute right to withdraw that plea to interpose any good defense which has arisen since the last continuance of the case. *Id.*
20. The Court properly refused to allow defendant to withdraw his plea of "not guilty," to interpose a plea that was not sufficient in law as a defense, and besides being defective in form, could not by amendment be made available. *Id.*
21. When a prisoner makes out a proper case for continuance, on account of the absence of a material witness, it is error to compel him to go to trial on the admission of the District Attorney that the witness, if present, would swear to the facts as stated by defendant. *Id.*
22. Although the prisoner may not have made out a very clear case for a continuance, still if the Court below was of opinion that injustice was done the prisoner because of the absence of his witness, the Court was justified in granting a new trial. *Id.*
23. When an order is made excluding defendant's witnesses from the court room, so that neither witness shall hear the others testify, and some of the witnesses come in during the trial, this may discredit such witnesses, and subject them to punishment for contempt. But the defendant himself not being in fault, is entitled to their testimony. *Id.*
24. Whilst our statute authorizes ministerial officers to carry into effect the judgment of criminal courts in all cases where the punishment is less than death, upon receipt of a certified copy of the judgment or sentence, thus dispensing with the necessity of a regular warrant for execution, still it does not prevent the officer from proceeding to execution of the judgment upon receipt of a formal warrant reciting the judgment of the Court, and requiring the officer to execute that judgment. *Ex Parte Smith*, 338.
25. The judgment in a criminal case recites that the prisoner was brought into Court, and plead guilty, "whereupon the Court sentenced the said Terence G. Smith," etc. Whether this record shows affirmatively that there was no interval of time between the plea of guilty and sentence: Query? *Id.*
26. If it does, it only shows error on the part of the Court, and defendant should have excepted to the action of the Court, and taken an appeal if dissatisfied. *Habeas corpus* is not the proper remedy to correct errors. *Id.*

CRIMINAL PRACTICE.

See CRIMINAL LAW, 1-8, 17-23.

DAMAGES.

See INJUNCTION, 1.

DAMAGES ON APPEAL.

See APPEAL, 25.

DEBT.

See JUDGMENT, 10.

TAXES, 1-8.

DEED.

1. A party executing a deed cannot avoid it because he spells his name wrong in attaching his signature to it. *O'Meara v. North American Mining Co.*, 113.
2. One who brings an action to recover real estate purchased under execution cannot show that the execution issued under a different judgment than the one recited on its face, nor can he contradict the recitals in the deed under which he claims. *Zabriskie v. Meade*, 285.
3. If a defendant in execution has no title to premises in question, either at the date of sale, or at any time subsequent to the period when the judgment was rendered, as appears by the recitals in the execution, in the advertisement of sale, in the certificate of sale and the Sheriff's deed, a party claiming under such execution sale will not be allowed to show that the true date of the judgment under which the execution was issued was different from all those recitals. *Id.*

DEMURRER.

See ESTATES OF DECEASED PERSONS, 6.

PLEADING, 19.

DEPOSITIONS.

1. When two cases are pending in the same Court, between the same parties, a deposition may be taken upon one notice, affidavit, and commission, to be read in both cases. *Scott v. Bullion Mining Co.*, 81.
2. A deposition taken in one case may be used between the same parties in another; so a deposition entitled in two cases between the same parties may be used in either. *Id.*
3. Where the deposition of the same witness is taken twice, and it appears that the first examination covered the whole ground of controversy, and was regularly taken, the Court might, perhaps, with propriety refuse to hear the second deposition. But if the first deposition is complete, the regular method would be to appear and contest the issuance of the second commission. *Id.*
4. Depositions will not be rejected for informality in the certificate of the officer before whom they are taken, when it appears that both parties were present, and the witnesses were cross-examined. *Lockhart v. Mackie*, 294.

5. A stipulation of the parties to a suit may dispense with any certificate by the officer taking depositions. *Id.*
6. It is too late to raise the objection in this Court for the first time that there was no proof of the absence of the witnesses whose depositions were read. *Id.*

DISCRETION.

See CRIMINAL LAW, 18, 19.
EQUITY, 7-9.

DISTRICT COURT.

See APPEAL, 12, 18.
CONSTITUTIONAL LAW, 10.
PARTNERS, 2.

DISTRICT ATTORNEY.

See CRIMINAL LAW, 17.

DRAWING JURORS.

See CRIMINAL LAW, 1-5.

DURESS.

1. A plea similar to that of duress: that the contract had been entered into only to avoid some threatened seizure or destruction of property, has sometimes been allowed in American Courts. But this plea can only be tolerated in cases of imminent danger, when the party has no other apparent means of saving his property from destruction, conversion, or asportation. *Bowers v. Beck*, 139.

See BOND, 10.

ELECTIONS.

1. An election cannot be held for an office at a time not fixed by law for such election. *State ex rel. Daggett v. Collins*, 351.
2. The phrase, "next general election," in the nineteenth section of "An Act to create a Board of County Commissioners, &c.," (Laws of 1864-5) means the general election on alternate years, commencing with 1864, and has no reference to the election of 1865, which is in some respects to be held as a special election, interpolated on the general system of biennial elections. *Id.*

EJECTMENT.

1. When, in an action of ejectment, the defendant, in addition to its legal defenses, sets up also an equitable defense, and asks affirmative relief, to wit: to declare that the deed under which plaintiff claims is only a mortgage, and this equitable branch of the case is tried separately from and disposed of before trying the legal defense: *Held*, that an order made and entered up in the form of a decree declaring that the instrument was not a mortgage, but a valid deed, conveying title to plaintiff, is not a final judgment from which defendant can appeal. *Low v. Crown Point Mining Co.*, 75.
2. There cannot be two final judgments in the same action. *Id.*
3. When there are two distinct defenses, it is not the proper practice to impanel

one jury to try the equitable defense, and another the legal defense. It is, however, proper to keep the two defenses separate. The Judge, himself, may first hear and determine the equitable side of the case; or, if in doubt, he may submit special issues to the jury who are to try the law side of the case. *Id.*

4. If a plaintiff, pending a suit in ejectment against several defendants, each in possession of distinct parts of the property sued for, sells out to one of the defendants, the controversy as to that defendant is ended, and he may under his purchase prosecute the same suit against the other defendants for such portion of the property as they hold. *Bullion Mining Co. v. Croesus G. & S. M. Co.*, 168.
5. In such case the purchaser, being substituted as plaintiff, cannot amend his complaint so as to include other property claimed by himself under a different title. *Id.*
6. When an action has been brought in due time for one piece or portion of property, it would be bad practice to allow the complaint to be so amended as to include another piece of property which would otherwise be protected from recovery by the Statute of Limitations, and thus embarrass the defense under that statute. *Id.*
7. When an undivided portion of a tract of land is recovered, the Sheriff would not be justified in entirely expelling the tenants who are in possession, if they make no opposition to a joint or common possession by those recovering the judgment. *Id.*
8. The Sheriff has no authority to put a party in possession of land not described in complaint or judgment. *Id.*
9. The fact that plaintiff recovered a vein or lead gives it no right to hoisting works erected for the purpose of taking ore from that vein, unless it also had recovered the surface on which the hoisting works were erected. *Id.*
10. Prior possession of land by the plaintiff, and ouster by defendant, makes a *prima facie* case for plaintiff, and throws the burthen of proof on defendant to show that he has some superior right. *McFarland v. Culbertson*, 280.
11. It is not sufficient for defendants to show the land is subject to pre-emption. They must show all the facts which establish their rights as pre-emptors. *Id.*
12. The plaintiff having shown his right as an occupant, the defendants, to have protected their possession, should have shown the land subject to pre-emption, and themselves of that class of persons entitled to pre-emption rights. *Id.*
13. A certificate of the Register of the Land Office that defendants had filed a declaratory statement in his office, did not prove that they were of the class of persons entitled to pre-empt. If the declaratory statement might be received as evidence on that point, at least that statement, or a certified copy thereof, should have been introduced. *Id.*

See HOISTING WORKS, 1, 2.

MINING CLAIMS, 10, 11.

POSSESSION, 1, 2.

TENANT IN COMMON, 1.

EQUITY.

1. A Court of Chancery may relieve from a judgment at law, after the Law Court has lost all jurisdiction. *Killip v. Empire Mill Co.*, 34.

2. But it must be upon a bill filed in a proper case. This equitable relief cannot be granted on motion. *Id.*
3. The relief in such cases is granted on the ground that the Law Court has lost jurisdiction, and, therefore, cannot afford the proper remedy. *Id.*, 44.
4. An agreement between some of the parties to a suit in equity cannot be the foundation for a decree, when there is nothing in the pleadings on which to base such decree. *Low v. Blackburn*, 70.
5. When there was litigation between Low, on one side, and a widow and her infant daughter on the other, as to the ownership of certain property, and it was agreed to compromise the litigation by first perfecting the title in Low, upon which he was to convey a part of the property to the widow. This will not authorize a decree declaring the widow has no title, and then requiring Low to convey, as per terms of compromise. Such a decree does not dispose of the infant's claim. *Id.*
6. Low would not be bound to convey whilst the claim of the infant remains unadjusted, nor until after his title was perfected. *Id.*
7. The proof offered as preliminary to the admission of a certified copy of a deed was not sufficient to comply with established rules of law. But the defect was merely technical and could have been supplied. It is a better practice in a Court of Chancery to allow such defects to be cured, than to deprive parties of their substantial rights for a mere technical error or omission. Per BEATTY, J. *O'Meara v. North American Mining Co.*, 113.
8. Courts of Equity should, in all cases, allow reasonable delay and indulgence to defendants to establish their rights. Per BEATTY, J. *Id.*
9. The Court did not use a wise discretion in rejecting this deed without further inquiry. Per BEATTY, J. *Id.*
10. The copy of the deed offered in evidence in this case was properly rejected. Per LEWIS, C. J. *Id.*
11. Courts of Equity independent of the statute might, in a proper case, remove a cloud from title. *Low v. Staples*, 209.
12. Courts of Equity will always interfere to protect one from the operation of a deed which is void, or from some cause ought not to be enforced, unless the deed is void on its face, when there is no necessity for such interference. *Id.*
13. Before a Court of Equity will interfere to remove a cloud, they must be satisfied that the party seeking relief has the legal title. If the possession is held adversely, the Court may properly refuse to act until the complainant has established his legal title by an action at law. *Id.*
14. Where the possession of the realty is in a corporation holding for the benefit of the original owners and assignees, and willing to recognize the right of whoever holds the proper assignment or transfer of the property, it is not necessary to bring an action at law preliminary to the establishment of a lost deed, and the removal of a cloud. *Id.*
15. The statute (Practice Act, Secs. 254-5) does not restrict any preëxisting right or remedy, but seems to give in some cases a new and more extensive remedy. *Id.*

See EJECTMENT, 1-3.

ESTATES OF DECEASED PERSONS, 1-8.

INJUNCTION, 1.

MEASURE OF DAMAGES, 8-10.

MORTGAGE, 5-8.

PARTNERS, 2-4.

EMBRACERY.

See CRIMINAL LAW, 14-16.

ERROR.

See APPEAL, 19, 23, 24.

CRIMINAL LAW, 7-9, 25, 26.

JUDGMENT.

PRACTICE, 15.

SALES ON EXECUTION.

ESTATES OF DECEASED PERSONS.

1. Our statute in regard to probate matters does not prohibit bringing suit on an allowed claim; but simply denies the plaintiff costs if he recovers no more than the administrator was willing to allow. *Corbett v. Rice*, 330.
2. When others than the defendant are necessary parties to a foreclosure suit, the proceeding cannot be in the Probate Court, but must be in equity. *Id.*
3. When only the mortgagee and the representative of the deceased mortgagor are necessary parties, the Probate Court and Equity Courts have concurrent jurisdiction. *Id.*
4. In those cases where a Probate Court has jurisdiction and can administer full relief, it is in the discretion of a Court of Equity to assume jurisdiction, or turn the parties over to the Probate Court. And if a Court of Equity proceeds with the foreclosure, it has the right either to allow or refuse costs to the mortgagee. *Id.*

Per dissenting opinion of LEWIS, C. J.

5. An action of foreclosure cannot be maintained against the estate of a deceased mortgagor after the note and mortgage have been allowed by the administrator as a valid claim against the estate, and before the final settlement, where there are no parties affected except the claimant and the administrator. *Id.*
6. When the complaint shows the fact that the claim has been allowed, it is demurrable precisely the same as if it alleged a former suit and judgment upon the same claim, because the allowance of the demand gives it all the effect of a judgment against the estate. *Id.*
7. The word "claim" in the Probate Act of this State includes secured as well as unsecured claims. *Id.*
8. The only distinction which the law seems to make between secured and unsecured debts is, that the former shall have the proceeds of the security applied in its payment, if the security is sold.

See LIMITATIONS, STATUTE OF, 4-6.

EVIDENCE.

1. The mere recital in a transcript from a Justice's docket that defendant was *duly served* is not sufficient. Before the transcript can be admitted to establish

- the rights of one holding under the judgment of a Justice, the facts in regard to the service of summons must appear. *McDonald v. Prescott & Clark*, 109.
2. It may be proved in a collateral proceeding that certain property was not actually sold by a constable at a judicial sale, notwithstanding the constable's certificate of sale. *Id.*
 3. Oral evidence not admissible to show error in the proceedings of Court below. *Ex parte Smith*, 338.

See ATTORNEY AT LAW, 1, 2.

BOND, 3.

CRIMINAL LAW, 11-13, 23.

DEED, 1-3.

DEPOSITIONS.

EJECTMENT, 10-13.

EQUITY, 1-3.

MORTGAGE, 2.

PLEADING, 4-7.

PRACTICE, 3, 8-10.

EXECUTION, LEVY, Etc.

See PLEADING, 12, 13.

SALES ON EXECUTION.

SURETY.

FINDINGS.

1. When a case is tried before a Court without a jury, and one of the facts found by the Judge, and the very one on which the case, in his opinion, turns, is wholly unsupported by evidence, this Court will not treat this particular finding as surplusage, in order to sustain the judgment on other findings, especially if the weight of testimony is against the other findings on which respondents seek to sustain the judgment. *Lockhart v. Mackie*, 294.

See APPEAL, 5.

MORTGAGE, 2.

PLEADING, 10, 11.

FRAUD.

See ATTACHMENT, 1-4.

PLEADING, 1, 2.

SALE OF CHATTELS, 1-4.

FRANCHISES.

See CONSTITUTIONAL LAW, 11.

GOLD COIN.

See JUDGMENT, 2-5, 10.

MORTGAGE, 4.

SALE ON EXECUTION, 8, 9.

HABEAS CORPUS.

See CRIMINAL LAW, 24-26.

EVIDENCE, 3.

HOISTING WORKS.

1. The fact that hoisting works are erected by a trespasser over a vein of ore, and for the purpose of hoisting that ore, does not give the owner of the vein any right to those works, unless he also is owner, or is entitled to the possession of the very soil on which these works are erected. *Bullion Mining Co. v. Croesus G. & S. M. Co.*, 180.
2. When hoisting works go with the ledge. *Id.*, 168.

INDIANS.

1. Whether they can take up a water right: Query? *Loddell v. Simpson*, 274.

INDICTMENT.

See CRIMINAL LAW, 17.

INFANT.

See EQUITY, 5, 6.

INJUNCTION.

1. When a bill is filed restraining County Commissioners from opening a road on the ground that they have not assessed the damages and provided for the payment thereof, it is error to grant a *perpetual* injunction. The Commissioners should only be restrained until they have complied with the preliminary requirements of the statute. *Champion v. Sessions*, 272.

INSTRUCTIONS.

See CRIMINAL LAW, 8, 9.

PLEADING, 17.

WATER RIGHT, 1.

INTEREST.

1. When a party borrows money and agrees to pay a certain rate of interest until due, the contract is broken when the day of payment is passed, and the note remains unpaid. After breach, in the absence of a continuing contract as to interest, the statute fixes the damages to be recovered. *McLane v. Abrams*, 199.
2. By our statute, the rate of interest (or damage for detention) after breach is the same as that fixed by the contract before breach. *Id.*
3. The statute gives damages at the rate of ten per cent. per annum for the withholding of money generally. But for withholding of money which bears a higher rate of interest by contract, a corresponding damage for withholding is allowed. *Id.*
4. And that higher interest is allowed although the contract itself does not provide for such higher rate after maturity of the debt. *Id.*

JUDGMENT.

1. Equity may relieve against after a court of law has lost jurisdiction. *Killip v. Empire Mill Co.*, 34.
2. Neither the written stipulation in this case, nor the recitals in the judgment, show that defendant consented to a judgment for gold coin. Even if such consent had been given, it would not have conferred on the Court authority or jurisdiction to enter such a judgment. *Hastings v. Burning Moscow Co.*, 93.
3. Although that part of the judgment requiring payment in gold coin was void, yet it might be injurious to defendant. *Id.*
4. A judgment for so much money to be paid in gold coin is not void. The judgment is valid, but the clause requiring it to be paid in coin is invalid. *Id.*
5. All parties are bound to notice the invalidity of the latter clause. *Id.*
6. A judgment for gold coin is erroneous. *Sholes v. Stead & Hunt*, 107.
7. The proper practice in entering judgments is for the Clerk to enter the same within twenty-four hours after verdict, or order of Court for judgment, leaving a blank for costs. If the cost bill is filed within two days after verdict, or order for judgment, the Clerk must fill the blank; otherwise it will always remain blank. Per BEATTY, J. *Howard v. Richards & Richards*, 128.
8. When the blank is filled up it must be considered as of the date of the judgment, and the judgment itself may, by relation, be considered as of the date of the decree for judgment. *Id.*
9. In this case the judgment must be considered as of the date of the eighteenth of December, when the order for judgment was made; and it should have been entered up on that or the following day. *Id.*
10. If no cost bill was filed within two days after date of order for judgment, none could afterwards be filed. *Id.*
11. When a written promise is made for the payment of a sum certain, payable in gold coin at a day certain, and is followed by a stipulation that in the event it is not paid at maturity the promisee may take judgment for an amount which, in the legal tender notes of the Government, is equal in value to the amount of gold coin first mentioned, this is a *debt* for the amount of gold coin first mentioned. The latter clause is a new penalty which cannot be enforced. The judgment must be for the *debt* and interest. *Hastings v. Johnson*, 190.
12. When a company is sued, under the provisions of our Practice Act, by its firm name, and subsequently on trial it is proved who compose that company, judgment may go not only against the company property, but against individuals composing that company. *Gillig, Mott & Co. v. Lake Bigler Road Co.*, 214.

See APPEAL, 6, 9-17.

EQUITY, 4-6.

EVIDENCE, 1.

PRACTICE, 15.

SALES ON EXECUTION, 1, 2.

TAXES, 1-8.

JUDGMENT ROLL.

See APPEAL, 9.

JUDGMENT BY DEFAULT.

See APPEAL, 1.
PRACTICE, 1.

JUDGMENT IN CRIMINAL CASES.

See CRIMINAL LAW, 24, 25.

JURORS IN CRIMINAL CASES.

See CRIMINAL LAW, 1-5.

JUSTICE OF THE PEACE.

1. The filing of a notice of appeal and undertaking on appeal in a Justice's Court after the rendition of a verdict by the jury, but before the entry of judgment thereon, does not deprive the Justice of authority to enter up judgment on the verdict. *Fugitt v. Coz*, 370.
2. A Justice should enter up judgment immediately on the rendition of a verdict. But if he omits to do so the day the verdict is rendered, still he may complete his record by afterwards entering the judgment. *Id.*

See CONSTITUTIONAL LAW, 10.
EVIDENCE, 1.

JURISDICTION.

1. The State Courts have jurisdiction to hear and determine causes left pending in the late United States Territorial Courts. *Hastings v. Johnson*, 190.
2. Where defendant appears and files an answer in the District Court of the State, any doubt as to whether the record was lawfully removed from the Territorial to the State Court is removed. *Low v. Staples*, 209.

See EQUITY, 1, 2.

ESTATES OF DECEASED PERSONS, 1-8.

JUDGMENT, 2.

NEW TRIAL, 1-6.

JUSTIFICATION OF OFFICER.

See PLEADING, 12, 13.

LANDLORD AND TENANT.

See PARTNERS, 6.

LAND.

See PARTNERS.

LAPSE OF TIME.

See LIMITATIONS, STATUTE OF.

LEGAL TENDER NOTES.

See TREASURY NOTES.

LIMITATIONS, STATUTE OF.

1. Under some circumstances lapse of time is a good defense, although the Statute of Limitations is not specially pleaded. *Gottschall v. Melsing*, 185.
2. A and B negotiate a loan in the State of California. A receives the money, and executes, on his part, a joint note, and also a mortgage on property situate in this State, as security for the money. This note and mortgage are then sent to Humboldt County, Nevada, where they are also executed by B, and the mortgage placed on record. *Held*, that the note and mortgage were consummated in this State, and are not barred by the Six Months' Statute of Limitations, which applies to notes, etc., executed out of this State. Even if the note was barred, the mortgagee might foreclose the mortgage, and subject the mortgaged property. *Read v. Edwards*, 262.
3. A party holding a mortgage is not barred of his right to foreclose the same until four years shall have elapsed from the accruing of the action, although the statute may have barred an action at law on the debt before that time. *Mackie v. Lansing*, 302.
4. When a party dies owing a debt not barred by the Statute of Limitations at his death, the holder of the claim has one year after administration granted on the debtor's estate, within which to bring his action, although the action would have been barred in less than one year, if the debtor had lived. *Wick v. O'Neale*, 303.
5. This extension of the time within which the action may be brought is subject only to this qualification, that if the claim is presented to the administrator and rejected, suit must be brought thereon within three months after rejection. *Id.*
6. This twelve months' extension applies to all classes of cases, as well those debts contracted out of the State, and which are otherwise barred by six months' limitation, as others. *Id.*

See EJECTMENT, 6.

MORTGAGE, 10.

LOCATION OF MINES.

See MINING CLAIMS, 1-5, 7-11.

LOST INSTRUMENT.

1. As to suit on, see PLEADING, 4-9.
2. As to action at law, preliminary to establishment of lost deed. *Low v. Staples*, 209.

MANDAMUS.

See CONSTITUTIONAL LAW, 10.

MEASURE OF DAMAGES.

1. The true measure of damages in an action of trover, is the value of the article when converted, with interest on that value to the time of trial. Per BEATTY, J. *O'Meara v. North American Mining Co.*, 112.
2. This rule should have this modification, if there is an actual conversion at one time not known to plaintiff and he afterwards demands his property and is

- refused, he may treat this conversion as only having taken place when he demanded the property. Per BEATTY, J. *Id.*
3. In this cause the prayer of the bill is for stock, and if that cannot be had, then an alternative decree for its value. In such a case the measure of damages is the value of the stock when the decree is rendered. *Id.*
 4. I concur in the measure of damages established in this case, but am not satisfied as to the general rule mentioned in the opinion. Per LEWIS, C. J. *Id.*
 5. Ordinarily the measure of damages in trover is the value of the article when converted, together with interest thereon, subject however to some qualifications. *Same Case on Petition for Re-hearing*, 123.
 6. The market value at time of conversion, and interest, will not in all cases be compensation to the plaintiff. *Id.*
 7. The true rule seems to be, the value of the article when converted, together with such additional damages as shall cover not only every additional loss which the plaintiff has sustained, but any additional value which the wrongdoer has obtained, or has it in his power to obtain. *Id.*
 8. The highest market value between the conversion and trial is not the rule, unless it be shown that but for the conversion the plaintiff would have realized that price. *Id.*
 9. Where the proceeding is in equity to compel the delivery of stock, and the defendant is unable to deliver it, the alternative decree should be for the value of the stock at the time of the trial. *Id.*
 10. The defense here was equally good, whether the defendant had delivered, or was only bound to deliver the stock to a third party. If another party was entitled to the stock, plaintiff could not be so entitled. *Id.*

MILL SITE.

See WATER RIGHT.

MINING CLAIMS.

1. *Query*—If one locates a mining claim for himself and others, and then enters into a contract for himself and on behalf of the co-locators to give a part of the ground for developing the mine, can the parties whose name he has used in the location accept of their interest in the mine without also ratifying the contract for developing the mine? *Chase v. Savage Silver Mining Co.*, 9.
2. In such case, if the acting locator draws up a contract with prospectors, which shows on its face that it was intended to be executed, not only by the party preparing the instrument, but also by others, whose names were attached without their knowledge to the notice of location, these latter are not bound until they sign the contract. The acting locator does not, in such case, profess to act for his associates. *Id.*
3. After notices of location were posted and recorded, and the limits of the mine determined, all the locators became tenants in common. The acting locators could not dispose of the interests of their co-tenants. *Id.*
4. If a contract between prospectors and the several locators of a mine is drafted, and signed by part only of the locators, if the prospectors go on to work, it is at their own risk. Those not signing or consenting to the contract are not bound. *Id.*

5. If, however, all had been consulted and agreed to the contract, and permitted the prospectors to go on with the work, probably they might have been compelled to a specific performance, although some of them had neglected to sign the contract. But the contract could not be enforced against one who never assented to it. *Id.*
6. When a suit is brought for a blind ledge or lode bounded by walls found at the depth of two hundred feet below the surface, the ledge only and no part of the surface can be recovered. *Bullion Mining Co. v. Cræsus G. & S. M. Co.*, 168.
7. When a miner locates a portion of the surface, and also a lode or ledge following its dips, angles, and spurs, he may have his Common Law judgment for the surface, and also a judgment following the lode under other public lands. *Id.*
8. When a ledge located as such comes to the surface, the locator may recover the surface, provided the outline of the ledge is visible on the surface. *Id.*
9. The common law doctrine, that he who possesses the surface of the earth owns all to the center of earth, is greatly modified as to the rights of miners and others on the public lands. One may be entitled to the occupancy of the surface, another to the veins of mineral running under the same land. *Id.*
10. A miner appropriating a piece of the public domain for mining purposes has a right to the exclusive possession of the ground so taken up. *Gottschall v. Mdsing*, 185.
11. A miner cannot by mere notice take up a piece of mining ground and hold it for five years without work or occupation; especially, when there is not even an intention to work it, except on the happening of a very uncertain event. *Id.*

See HOISTING WORKS, 1, 2.

MINISTERIAL OFFICER.

See CRIMINAL LAW, 24.

MUNICIPAL CORPORATIONS.

See CONSTITUTIONAL LAW, 1-9.

MISTAKE OF OFFICERS.

See SHERIFF, 2, 3.

MORTGAGE.

1. G. advanced money to a mortgagor to take up a mortgage. The money was paid to the mortgagee, and some days thereafter he assigned the mortgage to the party who advanced the money. *Held*, that if this assignment was made in pursuance of a contract between G. and the mortgagor, it was a valid security for the money advanced. But if the assignment was made after the money had been paid to the mortgagee, and not in pursuance of a previous contract, the mortgage was extinguished and afforded no security to G. *Nosler v. Haynes*, 53.
2. The answer *admits* the assignment of the mortgage to Gentry as security for the money advanced. This admission must prevail over the findings of the Court to the contrary. *Lewis, C. J. Id.*, 57.
3. A stipulation as to *amount* of judgment does not preclude the Court from en-

tering the necessary decree to enforce the payment by sale of mortgaged property. *LEWIS, C. J. Id.*

4. A direction in a foreclosure decree to sell mortgaged property for gold coin only, is injurious to one holding a subsequent lien, and such subsequent lien-holder may appeal from the judgment and have it reversed. *Miller v. Cherry*, 165.
5. A Court of Chancery may allow the mortgagee a per centage for the expense of collecting his mortgage when the instrument provides for such allowance. *McLane v. Abrams*, 199.
6. If the mortgagee is compelled to file a cross bill, in a case where he is made defendant, to collect his mortgage debt, he will be entitled to the same per centage as if he had filed an original bill. *Id.*
7. The allowance for a foreclosure suit should not always be the full amount mentioned in the mortgage, but a reasonable amount not exceeding that provided for. In this case there is nothing to show the allowance of ten per cent. was unreasonable. *Id.*
8. A Court of Equity may take judicial notice of what is a reasonable fee for foreclosing a mortgage in such Court. Ten per cent. on the amount of the mortgage was, in this case, unreasonable, and the Court should have reduced the allowance. Per *BEATTY, J. Id.*
9. As to foreclosing mortgage after the note is barred. *Read v. Edwards*, 262.
10. A party taking a second mortgage during the period intervening between the time when the statute bars the action at law, and when it bars the proceeding to foreclose, holds his lien subject to the first mortgage. *Mackie v. Lansing*, 302.

See ESTATES OF DECEASED PERSONS, 1-8.

LIMITATIONS, STATUTE OF, 2, 3.

PARTNERS.

PLEADING, 10, 11.

MOTION.

See APPEAL, 12, 18.

PLEADING, 19.

NEW TRIAL.

1. When notice of intention to move for new trial is served within two days after judgment, and followed up by statement, &c., as the statute prescribes, the Court retains jurisdiction of the case so far as to be able to dispose properly of the motion for new trial, although the Court may have adjourned for the term between the day judgment was rendered and the filing of notice without making any order continuing the jurisdiction over the case. *Killip v. Empire Mill Co.*, 34.
2. But if the term expires, and no notice of intention to move for new trial is filed within the statutory time, then the Court loses jurisdiction of the case. *Id.*
3. A mere verbal notice, given out of Court in conversation with counsel of the successful party, that a new trial will be moved for, is not sufficient. It must be in writing, or in open court, and a minute made of it. *Id.*
4. The facts in this case do not show any waiver of service of the notice. *Id.*

5. The Court, having lost jurisdiction of the case by the lapse of time, and the failure of respondent to file notice of intention to move for new trial within two days after judgment, could not restore its jurisdiction by an order allowing the notice to be filed *nunc pro tunc* as of a former day. *Id.*
6. *Query*—Could the Court have made such an order even during the continuance of the term at which the judgment was rendered? *Id.*
7. Extending the time for making statement, under the circumstances of this case, cannot be construed as a waiver of notice of intention to move for new trial. *Id.*
8. *Query*—Whether a verbal notice in open court of intention to move for new trial, entered on the minutes of the Court, is sufficient? *Id.*, 46.
9. When a party applies for a new trial on the ground of surprise, he must show that he has evidence, which, if introduced on a second trial, will probably change the result; or at least has evidence tending to rebut the point made by the other side which he complains of as a matter of surprise. *McClusky v. Gerhauser*, 47.

See CRIMINAL LAW, 22.

PRACTICE, 2.

NOTICE.

See POWER OF ATTORNEY.

PRACTICE, 11, 12, 14.

OVERRULED.

See CASES OVERRULED.

ORMSBY COUNTY.

See STATUTES, 7.

ORDERS.

See APPEAL, 3.

JUDGMENT, 6-9.

NEW TRIAL, 5.

PRACTICE, 14.

SURETY.

ORDER *NUNC PRO TUNC*.

See APPEAL, 3.

NEW TRIAL, 5.

PARAMOUNT TITLE.

See AGREEMENT, 1, 2.

PARTIES.

See BOND, 2, 12.

TENANT IN COMMON, 1.

PARTNERS.

1. One partner cannot bind the interest of his copartner in real estate by mortgage. *Arnold v. Stevenson*, 234.

2. The District Court has the power to appoint a receiver on an *ex parte* application, when a proper showing is made, as in this case. *Maynard v. Railey*, 313.
3. The Court will appoint a receiver when one partner excludes his copartner from a participation in the affairs of the partnership. So, too, when both partners have assigned their respective interests, and the assignees cannot agree. *Id.*
4. When suit is brought and summons issued, the Court has power to appoint a receiver before the summons is served on defendants. But the appointment of a receiver ought not to be made without notice, except in cases of emergency. *Id.*
5. Hearsay evidence cannot be received to show that one is a partner in a particular firm. *Mears v. James*, 342.
6. Parties renting property to amalgamators crushing their ore and running it into their amalgamating pans, at a fixed price per ton, do not thereby become partners with the amalgamators. *Id.*
7. A & B, being partners in any particular business, A is not bound to notify the world nor any particular person that he is not a partner of B's in a new and distinct business, into which B enters with other partners, and under a different firm name. *Id.*

See CORPORATIONS, 3-6.

PENALTIES.

See SHERIFF, 3.

PLEADING.

1. When the statute makes an instrument void or invalid it is proper to plead the statute specially. *Maynard v. Johnson*, 16.
2. At Common Law, a party could not plead his own fraud or violation of law as a defense to an action. But when the statute declares certain instruments shall be void, a defendant may plead the facts which make it void, although in so doing he shows a violation of law by himself. It being the policy of the law to allow such pleas to prevent the violation of the statute. *Id.*
3. The defendant might plead the want of the proper stamps, if such deficiency of stamps rendered the notes invalid. *Id.*
4. The plaintiff in an action against the maker of a promissory note, may show that the note sued on is in the possession of defendant, although that fact is not alleged in the complaint. *McClusky v. Gerhauser*, 47.
5. If the plaintiff is the owner of a promissory note, he has a right of action notwithstanding the defendant may be in possession thereof. *Id.*
6. The plaintiff's want of possession changes the character of the proof to be introduced, but not the character of the pleadings. *Id.*
7. A party need not plead the loss of an instrument to be allowed to introduce secondary evidence of its contents. It is only necessary to prove such loss on trial. *Id.*
8. The rule of pleading is different where a negotiable note properly indorsed is lost. There it has been held the owner of the lost note must of necessity resort to a Court of Chancery, because an innocent party coming into possession of the note in regular course of business, would be in a condition to

- maintain an action at law, rather than the one who lost it. If resort is had to a Court of Chancery, the facts giving chancery jurisdiction must be stated. *Id.*
9. When a note sued on is in possession of defendant, the remedy is at law. *Id.*
 10. The complaint avers the mortgage was not paid, and that it was regularly assigned. The answer denies neither of these allegations, and sets up no legal defense. On such pleadings, the plaintiff is entitled to his decree, although it seems from the facts found the defendant had a perfect defense against the mortgage claim, which, however, he utterly failed to set up. *BEATTY, J. Noel v. Haynes, 56.*
 11. Although the defendant had a good defense to this action, he owed the same amount of money which could have been recovered in another form of action. Having failed to make the proper defense, there is no hardship in compelling him to pay the money which he owes. *BEATTY, J. Id.*
 12. In an answer in which an officer attempts to justify seizure under execution he should not only set out the execution, but also a judgment on which the execution is founded, and show distinctly that defendant is an officer properly acting under such execution. *McDonald v. Prescott & Clark, 109.*
 13. An officer may justify in some cases under an execution alone. But under other circumstances, as when the controversy is with a purchaser whose title is only defective for want of a delivery, the officer must show the judgment as well as the execution. *Id.*
 14. A complaint setting out a note in full, and alleging the execution and delivery to, and ownership thereof by plaintiff, and that there is "due, owing, and payable" a certain sum, is a good complaint, although it does not in direct terms allege the nonpayment of the note. *Howard v. Richards & Richards, 128.*
 15. The fact that defendants appeared and filed their answer in the District Court of the State, removes all question or doubt which might otherwise have arisen as to whether the record in this case was lawfully removed from the Territorial to the State Court. *Low v. Staples, 209.*
 16. Although all forms of pleading are abolished, yet a party must prove the case he makes in his pleadings, or fail. A party who alleges a contract, and seeks to recover under that contract, cannot recover on proof of a trespass. *Carson River Lumbering Co. v. Bassett, 249.*
 17. The fact that there was evidence tending to sustain the complaint of plaintiff, will not sustain the judgment under the instructions in this case, which assumed that plaintiff might recover on proving that which would amount to a trespass, whilst the action was exclusively on contract. *Id.*
 18. When a complaint charges a sale and delivery of goods, it is not sufficient for defendant in his answer, to say he never "had or requested" any goods of plaintiff. There must be a direct and not argumentative denial of the sale and delivery. *Gallagher v. Dunlap, 326.*
 19. When an answer is put in defective only in form, plaintiff should demur, and not move for judgment on the pleadings. He cannot, by moving for judgment on the pleadings, deprive defendant of the right to amend. *Id.*

See BOND, 2-4.

DURESS.

EQUITY, 4.

JUDGMENT, 2.

PRACTICE, 11, 12.

POSSESSION.

1. An occupation of timber land within boundaries clearly marked and defined, constitutes possession, without any actual inclosure of such lands by fence. The law only requires such possession to be taken as will make the land available and useful to the occupier. Arable and meadow lands must be inclosed to be valuable for any useful purpose. Timber land need only to be marked out to show within what boundaries the occupant claims. *McFarland v. Culbertson*, 280.

POWER OF ATTORNEY.

1. The deposit for record of a revocation of a power of attorney in the proper office operates under our statute as a notice to all parties dealing with the attorney. By such deposit, the revocation becomes absolute without actual notice to the attorney. *Arnold v. Stevenson*, 234.

PRACTICE.

1. *Query*—Whether in this case the Court erred in setting aside a judgment by default? *Maynard v. Johnson*, 16.
2. The sixty-eighth section of the Practice Act does not provide for the granting of such relief as was attempted to be granted by the *nunc pro tunc* order in this case. *Killip v. Empire Mill Co.*, 34.
3. Upon notice to defendant who is in possession of note sued on, to produce the same, and failure on his part, plaintiff may prove contents. *McClusky v. Gerhauser*, 47.
4. Supreme Court will not reverse a judgment unless error affirmatively appear. *Nosler v. Haynes*, 53.
5. Section 283 of Practice Act of 1861, and Section 8 of the Act of 1864-5, in relation to Courts of Justice, commented on. *Hastings v. Burning Moscow Co.*, 100.
6. Even if the Supreme Court on appeal from a judgment might order an execution and sale made before appeal to be set aside, yet it is clear that the District Court after case reversed has concurrent jurisdiction to do the same thing. *Id.*
7. It is the proper practice after a judgment has been reversed in this Court, to move in the Court below, when the facts justify such proceedings, to set aside a sale made on execution under an erroneous judgment. *Id.*
8. Calling the Court's attention to a part of a record by defendant, whilst plaintiff is proposing to introduce other portions of the same record as evidence, cannot be treated as an introduction of that part by the defendant. *Bowers v. Beck*, 139.
9. In a trial before the Court without a jury, where one party offers a paper in evidence, and the other side objects, and the objecting party hands the paper to the Judge for inspection to see whether it shall not be excluded, and the paper is excluded, the objecting party cannot afterwards claim that the paper was in evidence because of the fact that it was read by the Judge for this special purpose. *Id.*, 157.

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8. Calling the Court's attention to a part of a record by defendant, whilst plaintiff is proposing to introduce other portions of the same record as evidence, cannot be treated as an introduction of that part by the defendant. *Bowers v. Beck*, 139.
9. In a trial before the Court without a jury, where one party offers a paper in evidence, and the other side objects, and the objecting party hands the paper to the Judge for inspection to see whether it shall not be excluded, and the paper is excluded, the objecting party cannot afterwards claim that the paper was in evidence because of the fact that it was read by the Judge for this special purpose. *Id.*, 157.

10. So, if one side offers in evidence a certain number of papers selected from a bundle, and the other side objects because there are other papers belonging to the same bundle, which he claims would show those papers offered should not be admitted in evidence, and he calls the attention of the Court to those other papers, and induces the Judge to read them before deciding the objection, this does not put those latter papers in evidence for the general purposes of the trial. *Id.*, 157.
11. A complaint cannot be altered in a material part thereof without notice to defendant. Especially it cannot be so altered as to set out a new and distinct cause of action. *Keller v. Blasel*, 162.
12. Where there has been a decision of this Court to the effect that one of several defendants in the case made by plaintiff cannot be held either severally or jointly with the other defendants, and upon the case being called again in the lower Court, the plaintiff so amends his complaint as to dismiss as to all other defendants, and make a case against the defendant who had previously been held not liable, and then proceed to trial in his absence, this is such surprise as to entitle that defendant to a new trial. Per BEATTY, J. *Id.*
13. This Court will not sanction a practice which is unprecedented and calculated to produce complication, and result in injustice, merely because it may be shown that the counsel of complaining party might, by the exercise of great astuteness and readiness, have guarded against the threatened injury. *Bullion Mining Co. v. Orzesz G. & S. M. Co.*, 180.
14. When the statute says an order may be made on due notice to the opposite side, it means the statutory written notice of five days, and it would not be proper to hear a motion and make the order until such notice had been given and the full five days expired. *Wilde v. Wilde*, 306.
15. It is error to render judgment against a party who is made defendant by amending a complaint without giving him an opportunity to answer. *Mears v. James*, 342.
16. An answer palpably frivolous, or not verified when it should be, may be stricken out on motion, and if, after a reasonable time given to perfect such answer, it is not done, judgment may be rendered in accordance with the prayer of the complaint. *Lehane v. Keyes*, 361.

See ALIMONY.

APPEAL, 2-5, 9-19, 21, 23-25.

BILL OF EXCEPTIONS, 1.

COST BILL.

DEPOSITIONS.

EJECTMENT, 1-5.

EQUITY, 1, 2, 7-9, 11-15.

ESTATES OF DECEASED PERSONS, 6.

FINDINGS.

JUDGMENT, 6-9, 11.

JUSTICE OF THE PEACE, 1, 2.

MORTGAGE, 3, 4-8.

NEW TRIAL, 1-9.

PARTNERS, 2-4.

PLEADING, 16-19.

PROHIBITION, 3.

SALES ON EXECUTION, 3-9.
STATEMENT ON APPEAL, 1, 2.
SURETY.

PRE-EMPTION.
See EJECTMENT, 11-18.

PRESUMPTIONS.
See APPEAL, 19.

PRINCIPAL AND AGENT.

1. An agent cannot bind his principal by a written instrument, unless it appears from the instrument itself he was acting for the principal. *Chase v. Savage Silver Mining Co.*, 9.
2. When there is anything on the face of a note or bill of exchange showing that the party signing is acting for another, and not himself, parol testimony may be introduced to bind the principal. *Gillig, Mott & Co. v. Lake Bigler Road Co.*, 214.
3. A bill and acceptance in the following words indicates that J. E. Garrett was acting as agent for the Lake Bigler Road Company, and not for himself, in the acceptance:

LAKE BIGLER ROAD COMPANY,
Carson, January 15th, 1864. }

[\$2,000.] Four months after date, pay to the order of Messrs. Gillig, Mott & Co. two thousand dollars, with interest at two and one-half per cent. per month till paid—value received—and charge the same to the account of

BUTLER IVEY, Sup't.

To J. E. GARRETT, Secretary, Carson. *Id.*

4. The mere writing the word "agent" after the signature to a note or bill will not bind the principal; but if the name of the principal appears on the face of the instrument, then the word "agent" following the signature may, in connection with other things in the instrument, indicate that the principal only is bound. *Id.*
5. The word "Superintendent," or "Secretary," written after a signature, has the same effect as the word "agent." *Id.*
6. Although the written authority to the Secretary did not authorize him to accept bills, yet the fact that he had frequently accepted bills in favor of plaintiff, which were paid by defendant without complaint, was sufficient to bind defendants on other acceptances. *Id.*

See POWER OF ATTORNEY.

PROBATE COURT
See ESTATES OF DECEASED PERSONS, 1-8.

PRODUCTS OF MINES.

1. Are personal property, and taxable for municipal purposes. *City of Virginia v. Chollar-Potosi G. & S. M. Co.*, 86.

PROHIBITION.

1. An Order of Prohibition may issue from this Court in a proper case to arrest the progress of a trial. But such order should not issue when there is other and adequate remedy. *Low v. Crown Point Mining Co.*, 75.
2. The office of such writ is not to correct errors, but to prevent Courts transcending the boundaries of their jurisdiction. *Id.*
3. Upon this writ of prohibition we cannot review an interlocutory order made in the Court below. That can only be reviewed on appeal from the final judgment. *Id.*

PROMISSORY NOTE.

See JUDGMENT, 10.

LIMITATIONS, STATUTE OF, 2.

PLEADING, 4-9, 14.

PRINCIPAL AND AGENT, 2-6.

PROSPECTING CONTRACTS.

See MINING CLAIMS, 1-5.

PUBLIC LAND.

1. As to appropriation of by miners.

See MINING CLAIMS, 10, 11.

PURCHASER AT EXECUTION SALE.

See DEED, 2, 3.

JUDGMENT, 4.

PLEADING, 13.

SALES ON EXECUTION, 1-9.

REAL ESTATE.

See PARTNERS.

RECEIVER.

See PARTNERS, 2-4.

RECITALS.

See BOND, 3, 13.

CRIMINAL LAW, 24.

DEED, 2, 3.

REGISTRATION.

See POWER OF ATTORNEY.

RELEASE FROM BOND.

See AGREEMENT, 1, 2.

REMEDY.

See EQUITY, 11-15.

REMOVAL OF CAUSES FROM TERRITORIAL TO STATE COURTS.

See PLEADING, 15.

REPLEVIN.

1. In an action of replevin, the judgment must be for the return of the property and an alternative judgment for its value if not returned. An absolute judgment for its value, not allowing defendant to satisfy the judgment by return of the property with costs and damages, is erroneous. *Lambert v. McFarland*, 58.

RESTITUTION, WRIT OF.

See EJECTMENT, 8, 9.

REVOCATION.

See POWER OF ATTORNEY.

RIPARIAN RIGHTS.

See WATER RIGHT, 2-9.

SALE OF CHATTELS.

1. H., the owner of two mules, keeps them at a public stable, and uses them in hauling for C. C. pays the owner of the stable for keep of mules. Subsequently, C. buys the mules of H., and immediately puts them in a team with other mules of his own, driven by another party in the employ of C. In a few days they are removed from the public stable to C.'s private stable. *Held*, this is an immediate delivery, within the meaning of that phrase in the Statute of Frauds. *Carpenter v. Clark*, 243.
2. Several months after the purchase of these two mules by C., he employs H. as a teamster, and sets him to driving a team of eight mules—two of which he had purchased a few months back from H., the others had never been owned by H. The mules were all kept at the stable of C. *Held*, this was not a violation of that clause of the law regarding fraudulent conveyances, which requires a continued change of possession. *Id.*
3. When real estate is sold, and at the same time possession of the realty is delivered by the vendor to the vendee, a bill of sale from the same vendor to the same vendee is given for the personal property in and on the real estate sold, the possession of the personal property passes with the possession of the realty, and no removal or other delivery of the personal property is necessary than that arising from contract and the actual change of possession of the realty. But when the same bill of sale is also of other property not on the real estate sold, there must be other and actual delivery to pass the possession as against creditors. *Sharon v. Shaw*, 289.
4. The mere request made to a servant of the vendor who has the property in actual possession, to keep it for the vendee, without any removal or change in the situation of the property, is not an actual delivery or change of possession of the property. *Id.*

SALES ON EXECUTION.

1. Sales under a void judgment are a nullity. But sales under a judgment merely erroneous are good, and pass the title to the property sold. *Hastings v. Burning Moscow Co.*, 100.
2. Whilst the mere reversal of a judgment will not invalidate a sale regularly made, there is no doubt Courts may, under proper circumstances, (when the rights of innocent parties are not thereby injuriously affected) set aside such sales. *Id.*

3. Sales made under erroneous judgments will be set aside as far as can be done without injury to third parties. *Id.*
4. When a judgment is reversed, the parties should as near as possible be restored to the condition they were in before error was committed. *Id.*
5. A third party purchasing at a judicial sale, and paying his money, ought as a matter of policy to be protected. *Id.*
6. When the judgment is merely modified, and the plaintiff has been the purchaser of property, it may or may not be necessary or proper to set aside a previous sale. *Id.*
7. The sale in this case should be set aside: first, because there was an irregularity in the judgment which all parties were bound to notice; and second, the plaintiff being the purchaser, the setting of the sale aside only replaces the parties in the position they occupied before error committed. *Id.*
8. *Query*—If a Sheriff advertises to sell property for gold only, can a stranger to the proceedings, who only connects himself with the sale by bidding, compel the Sheriff to receive paper? *Id.*
9. Even if a stranger could do so, he would not bid full value for the property knowing he must have a lawsuit before he could compel the Sheriff to take the paper. *Id.*

See DEED, 2, 3.

EVIDENCE, 2.

SHERIFF.

1. Power of, under writ of restitution. *Bullion Mining Co. v. Croesus G. & S. M. Co.*, 168.
2. Section 10 of an Act entitled "An Act relative to Sheriffs," (Laws of 1861, page 108) only refers to those cases where there is a wrongful withholding of the money collected by the Sheriff, and not where there is a mistake in its application, and it is shown that the Sheriff has not the money in his hands. *Giffin v. Smith*, 374.
3. It is not the policy of the law to inflict penalties upon its officers for mistakes or errors of judgment. *Id.*

SHERIFF'S DEED.

See DEED, 2, 3.

SHERIFF'S SALE.

See SALES ON EXECUTION.

SPECIFIC PERFORMANCE.

See EQUITY, 6.

MEASURE OF DAMAGES, 3, 9.

MINING CLAIMS, 5.

STAMPS.

1. Considering the form in which the 158th section of the Stamp Act passed the Lower House of Congress; the amendment and proviso added thereto in the Senate; the effect which that amendment was admitted to have, both by its friends and opponents; the subsequent amendments of the law by an Act which gives a legislative interpretation to that section; and the general object and intention of the law—it seems more reasonable to construe the

- terms "such instrument" in the latter part of that section as referring to all unstamped instruments, rather than as being confined to those which were left unstamped with a fraudulent intent to evade the revenue. *Maynard v. Johnson*, 25.
2. The former opinion of this Court on this point is held erroneous, and it is held that notes issued under the Act of June 3d, 1864, not properly stamped, were void. *Id.*
 3. The Stamp Act of Congress does not declare any notes to be invalid for want of the proper stamps, except where omitted for the purpose of evading the law. [Overruled in opinion upon re-hearing, next above.] *Id.*, 16.

See *APPEAL*, 2.

BOND, 1, 14.

PLEADING, 2.

STATEMENT ON APPEAL.

1. This Court has never held it indispensable that a statement should be made in the Court below of the grounds relied on upon appeal, in order to entitle the appellant to a hearing. Whilst the Court has censured the loose practice of omitting such statement of these grounds of error, it has not denied relief to litigants for the carelessness of their counsel in this respect. *Gillig, Mott & Co. v. Lake Bigler Road Co.*, 214.
2. The exceptions to the rulings of the Court below will be treated as a substitute for a statement of the grounds of error relied on. *Id.*

STATEMENT ON NEW TRIAL.

See *NEW TRIAL*, 1, 7.

STATUTES.

1. In cases of doubtful construction, the debates of a Legislative body may be resorted to, to determine the meaning of a law. But this only in cases where the language of the law is so ambiguous as not clearly to show the meaning intended to be conveyed. *Maynard v. Johnson*, 25.
2. In interpreting doubtful statutes, the primary object is to ascertain the intent of the Legislature. *Id.*
3. This intent is to be gathered, first, from the language of the statute, next from the mischiefs intended to be suppressed, or benefits to be attained. *Id.*
4. If one clause of a statute is ambiguous, the whole Act is to be examined to explain or remove that ambiguity. *Id.*
5. If the Legislature passes an Act amending a former Act, but providing the amendatory Act shall not take effect until a future day, the old Act remains in full force until the amendment goes into operation. *Bowers v. Beck*, 157.
6. So, too, if it is provided in the amendatory Act that such amendments shall only be operative for the enforcement of future contracts, the old law is in full force, so far as relates to the enforcement of prior contracts. *Id.*
7. Sections four and five of the Act of March 12th, 1866, in regard to the consolidation and payment of the debts of Ormsby County, are ambiguous as to one point, and equally capable of either construction, as to whether there shall be paid out on bids for the surrender of County indebtedness, all money in the Redemption Fund when the bidding is closed, or only such money as is in the

Fund the day an advertisement for bids is first published. The former construction being most beneficial to the public, will be adopted. *Hayden v. Supervisors of Ormsby County*, 371.

See CRIMINAL LAW, 24.

ELECTIONS, 1, 2.

SHERIFF, 2, 3.

STAMPS, 1, 2.

STOCK.

See CORPORATIONS.

STRIKING OUT ANSWER.

See PRACTICE, 16.

SUMMONS.

See EVIDENCE, 1.

SUPREME COURT.

See AMENDMENT OF RECORDS, 1.

APPEAL.

SURETY.

1. A sues B, and attaches his goods. C, for the purpose of releasing the goods, entered into a bond conditioned to pay to plaintiff, on demand, any judgment he may recover against B. The attorneys of A and B adjust the amount due from B to A, and enter into a written stipulation that judgment may be entered up in Court in favor of A for the amount due, with a promise that if B pays half the amount in thirty days, he may have sixty days to pay the balance. The judgment is entered up for the amount found due to A, but there is no order of Court in regard to staying execution either for thirty or sixty days. *Held*, this arrangement did not discharge the surety on the bond given to release the property attached. *Seawell v. Cohn*, 308.

SENTENCE.

See CRIMINAL LAW, 24, 25.

STIPULATION.

See DEPOSITIONS, 5.

JUDGMENT, 2, 10.

SURETY.

TAXES.

1. A judgment which is personal against the tax-payer, and *in rem* against real estate, is a debt within the purview of the Act of Congress, which makes certain United States notes a legal tender for debts. *Rhodes v. O'Farrell*, 60.
2. A debt is a legal obligation or liability to pay a sum certain, and may arise from contract as from some liability imposed by law, and not arising out of contract in its more limited sense. Per BEATTY, J. *Id.*
3. If a more extended definition is given to the term contract so as to include all

judgments within that term, then it must also include the liability to pay taxes. Per *BEATTY, J. Id.*

4. All judgments for money, and all taxes payable in money, and for which an action might be brought against the delinquent, are debts. Per *BEATTY, J. Id.*
5. The State may impose taxes payable in gold, where no debt is created. *Id.*
6. She may impose stamp duties and not part with the stamps until the purchaser pays gold for them. She may require license to be taken out and not issue such license until it is paid for in gold. But all judgments in favor of the State are debts, and may be paid in paper. *BEATTY, J. Id.*
7. Taxes are not debts within the purview of the Act of Congress referred to. Per *BROSNAN, J. Id.*
8. But if the State goes into Court and obtains a judgment for these taxes against the person of the tax-payer, this personal judgment becomes a debt, and like other debts may be discharged in paper. Per *BROSNAN, J. Id.*

See CONSTITUTIONAL LAW, 6-9.

TENANT IN COMMON.

1. All tenants in common, under our statute, may unite in prosecuting an action for possession of the common property. So one tenant in common may sue for his share. But whether more than one and less than all may sustain such an action: *Query? Bullion Mining Co. v. Cræsus G. & S. M. Co., 168.*
2. A tenant in common suing for only a part interest in the property cannot recover judgment for the whole. *Id., 180.*

See MINING CLAIMS, 8.

TERRITORIAL COURTS.

1. State Courts have jurisdiction to hear and determine causes left pending in the late Territorial Courts. *Hastings v. Johnson, 190.*

See AMENDMENT OF RECORDS, 1-5.

PLEADING, 16.

TORT.

1. As to waiver of and suit in assumpsit.

See ASSUMPSIT.

TRESPASSER.

See HOISTING WORKS, 1, 2.

TREASURY NOTES.

See JUDGMENT, 2, 10.

TAXES, 1-8.

TROVER.

See MEASURE OF DAMAGES, 1-10.

VERIFICATION.

1. When not made in time.

See PRACTICE, 16.

VIRGINIA CITY.

See CONSTITUTIONAL LAW, 1-9.

WARRANT FOR EXECUTION.

See CRIMINAL LAW, 24.

WATER RIGHT.

1. Where an action is brought to recover a water right, and *will site* described by metes and bounds, as land boundaries are usually described, *held* that an instruction to the effect "that the plaintiff, in order to recover, must prove that he was entitled to the premises and water, and that defendants damaged him by the diversion of the water," is erroneous. To entitle plaintiff to recover, it was only necessary to prove title and immediate right of possession in himself, and the occupancy by defendants of the premises described when suit was brought. *Dilley v. Sherman*, 67.
2. At common law, riparian proprietors were entitled to have the water naturally flowing over or past their land, continue so to flow without interruption or diminution. *Loddell v. Simpson*, 274. ✓
3. But in California, owing to the peculiar situation of the lands therein (belonging to the United States Government, but thrown open to the common use of miners and others) a different rule has properly been adopted. There the first appropriator of the water is held entitled without regard to the occupancy of the lands over which the water naturally flowed. *Id.*
4. When a plaintiff claims water on the ground of prior appropriation, it is error in the Court to refuse an instruction to this effect: "The plaintiff is not entitled to any greater quantity of the water of Desert Creek than he actually appropriated prior to defendant's appropriation." *Id.*
5. *Query*—What would have been the rule if plaintiff had claimed by reason of occupancy of the land, and as riparian proprietor? *Id.*
6. *Query*—Whether defendant could derive any right by conveyance from an Indian? *Id.*
7. The first appropriator has the right to all water appropriated by him as against subsequent appropriators, and has the right to erect dams, divert water, etc., before any subsequent appropriation, but not to make any new dams or diversions of water after a subsequent appropriation. *Id.*
8. A second appropriator has a right to have the water continue to flow as it flowed when he appropriated. *Id.*
9. Plaintiff takes up land on a stream from which a part of the water has already been diverted by a ditch and dam. Subsequently defendant takes up the land on which the ditch and dam are situated. The plaintiff has no right to remove the dam. *Id.*

WITHDRAWING PLEA OF "NOT GUILTY."

See CRIMINAL LAW, 18, 19.

WITNESSES.

See CRIMINAL LAW, 21, 22.
DEPOSITIONS, 6.

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